Appeals for the Eleventh Circuit found, based on prior Eleventh Circuit precedent, that the district court did not err in applying the *McDonnell Douglas* standard and affirmed the district court's grant of summary judgment.

We granted certiorari to consider whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged forty years or older shall be made free from any "discrimination based on age," 29 U.S.C. § 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action. We now reverse.

II

A

The question at issue is ultimately one of statutory interpretation. We start with the text and plain language of 29 U.S.C. § 633a(a): "[a]ll personnel actions" affecting federal-sector employees, "shall be made free from any discrimination based on age." There are five key components of the statute's text that necessitate a finding that the statute's "sweeping language" precludes a "but-for" test. *Ford v. Mabus*, 629 F.3d 198, 205 (D.C. Cir. 2010) (quoting *Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001)).

First, the statute states "[a]ll personnel actions" must be "*made* free from any discrimination." 29 U.S.C. § 633a(a) (emphasis added). Linguistically, "making" a decision indicates the existence of a process; as opposed to "taking" an action, which would indicate the existence of an outcome. "Made" indicates that liability for discrimination need not be driven by any given outcome. Rather, the *process* of coming to a decision on matters of personnel action is subject to a prohibition on age discrimination. Here, as the Petitioner eloquently states, the government is required to "undertake one of its functions ('ma[king]' 'personnel actions') in a certain manner ('free from any' age discrimination)." Pet'r's Br. 17. This construction of the phrase "shall be made"—one that includes the process of

decisionmaking—is consistent with numerous other statutes in the U.S. Code. *See, e.g.*, 22 U.S.C. § 1626(a) (payments "shall be made in accordance with such regulations as the Secretary of the Treasury may prescribe"); 26 U.S.C. § 401(a)(27)(A) (determination of whether a plan is a profit-sharing plan "shall be made without regard to current or accumulated profits of the employer and without regard to whether the employer is a tax-exempt organization"); 42 U.S.C. § 9604(e)(7)(C) (confidentiality designations "shall be made in writing and in such manner as the President may prescribe by regulation"); 43 U.S.C. § 618c(a) (adjustments with contractors "shall not be made in cash, but shall be made by means of credits extended").

Second, the phrase "free from" is significant. The statute requires "[a]ll personnel actions" to be made completely "relieved from" or "clear of" discrimination. *See Oxford English Dictionary Online* (3d ed., 2008) (defining "free," when used with "from," as "[c]lear of something which is regarded as objectionable or problematic"); *Merriam-Webster Online,* https://www.merriam-webster.com (last visited Feb. 8, 2020) (defining "free" as "relieved from or lacking something and especially something unpleasant or burdensome," *e.g.*, "free from pain"); *see also Webster's New Collegiate Dictionary* 457 (1977) ("exempt, relieved, or released esp. from a burdensome, noxious, or deplorable condition or obligation," *e.g.*, free "from pain"). If the process of decision-making, in regards to personnel action, is to be "free from" discrimination, a "but-for" requirement would necessarily exclude claims the text seeks to include.

Third, the text includes the word "any." This word, modifying "discrimination," obliges the government to ensure personnel actions—and the process by which they are made—are conducted wholly without discrimination. *See Oxford English Dictionary Online* (3d ed., 2016) (defining "any" "[i]n negative contexts" as "even a single; the slightest"); *United States v. Gonzales,* 520 U.S. 1, 5 (1997) (the word "any" has an "expansive meaning").

Further, the word "any" implies discrimination can present itself in different forms and to varying degrees. Therefore, even in a case where discrimination occurs to a lesser degree—perhaps to a degree that would not rise to the level of directly causing an adverse outcome—such discrimination is certainly still encompassed in and barred by the statute's prohibition on "any discrimination."

Fourth, the word "discrimination," understood both today and when the federal-sector provision was enacted in the 1970s, means unjust and differential treatment. *See, e.g.*, "Discrimination," *Oxford English Dictionary Online* (3d ed., 2013) ("Unjust or prejudicial treatment of a person or group, esp. on the grounds of race, gender, sexual orientation, etc."); *Cambridge Dictionary,* https://dictionary.cambridge.org/us/dictionary/ (last visited Feb. 8, 2020) ("treating a person or a particular group of people differently, especially in a worse way from the way in which you treat other people, because of their skin colour, sex, sexuality, etc."); *Merriam-Webster Online* ("the act, practice, or an instance of discriminating categorically rather than individually"); *Black's Law Dictionary* 259 (Fifth Pocket Ed. 2016) ("Differential treatment; esp. a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."). While other antidiscrimination statutes may have language limiting actionable discrimination to that which results in an adverse outcome, that limitation is not innate in the word itself. Any such limitation would come from words modifying the word "discrimination." The word "discrimination" itself is quite broad and encompasses all unequal treatment that results in "the inability to compete on an equal footing." *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Finally, we must examine the phrase "based on." Petitioner argues this Court's prior precedent necessitates a finding that this phrase means "but-for." *See University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338, 350 (2013) (citing *Safeco Insurance Company of America v.*

Burr, 551 U.S. 47, 63–64 & n.14 (2007) (stating "because of means 'based on'" and "'based on' indicates a but-for causal relationship")). However, the language of the statutes at issue in *Nassar* and *Safeco*, Title VII's antiretaliation provision and the Fair Credit Reporting Act respectively, are distinct from the language at issue here. *See Nassar*, 570 U.S. 338; *Safeco*, 551 U.S. 47. Unlike the aforementioned statutes, the phrase "based on age" in the ADEA modifies *discrimination* and refers only to the type of discrimination being prohibited. The statute would have an identical meaning if it were to read: "All personnel actions . . . shall be made free from any age discrimination." *See Black's Law Dictionary* (11th ed. 2019) (defining "age discrimination" as "[d]iscrimination based on age"). Therefore, we are not convinced that the usage of the phrase "based on" in the ADEA requires the application of a "but-for" causation standard.

Based on our reading of the plain meaning of the text, we find the text does not support a finding that the ADEA requires proof of "but-for" causation under the *McDonnell Douglas* standard.

B

Even if the text itself is not clear as to whether a "but-for" causation standard is required, we find the origins, history, and context of the statute strongly support a finding that no such causation standard is necessitated.

As we have consistently recognized, "Congress legislates against the backdrop of existing law." *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013). In the 1960s and 1970s, Congress passed numerous antidiscrimination statutes. In 1964, ten years before the passage of the ADEA, Congress passed the Civil Rights Act of 1964. This statute only applied to private-sector employers until 1972, when Congress added a provision that applied to federal employment. Similarly, when the ADEA was passed in 1967, it only included protections for private-sector employees, until it was amended in 1974. During this time period, Congress was clearly focused on halting discriminatory practices based on a variety of protected

categories in a variety of settings. Given that this ADEA's federal-sector provision was the last addition to the framework of antidiscrimination legislation in this formative ten-year period, this Court finds it useful to compare the wording of the ADEA's federal-sector provisions to other provisions enacted during this period.

The federal-sector provisions of the ADEA are definitionally and textually distinct from legislation aimed at protecting private-sector employees. For instance, the private-sector language of the ADEA prohibits an employer from, among other things, "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). This language does not mirror the language in the federal-sector provision. Not only do the structures of the sentences differ sharply, the private-sector provision (1) explicitly enumerates personnel actions and outcomes that are actionable, (2) uses the phrase "because of," and (3) does not include the absolutist language (i.e., "free from" and "any") found in the federal-sector provision. As we have previously found, "Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector." *Lehman v. Nakshian*, 453 U.S. 156. 166 (1981). Further, the federal-sector statute itself includes a provision in 29 U.S.C. § 633a(f), which provides a clear indication that the federal-provision was and is intended to be distinct from the private-sector provisions.

Based on this history and legislative context, we make several findings.

First, we are convinced the case at hand is properly distinguishable from *Gross v. FBL Financial Services, Inc.* 557 U.S. 167 (2009). The language of the private-sector provision at issue in *Gross* is clearly distinct from language at issue in the present case, as the federal-sector provision's language is more protective and expansive.

Second, we find *Nassar*'s default background rule of "but-for" causation not applicable to the statute in this

case, as Congress has clearly provided an "indication to the contrary in the statute" through the federal-sector provision's aforementioned language, history, and context. *Nassar*, 570 U.S. at 347.

Third, it is clear that Congress chose to use different, broader, and more absolute language in the ADEA's federal-provision than it did when drafting other antidiscrimination statutes during the same time period. Therefore, as we recognized in *Gross*, "[w]e must give effect to Congress' choice." 557 U.S. at 177 n.3 (2009). Yet, in order to make this choice meaningful, the distinct language in the ADEA must give rise to a different and separate standard. Because the private-sector provisions require proof of "but-for" causation under the *McDonnell Douglas* standard, the federal-sector provisions must demand something else.

Fourth, we are unconvinced by arguments that Congress could not have intended to afford additional protections for federal employees, as compared to private-sector employees. While it is often unproductive to speculate as to Congress' exact legislative intent, in this case, it would not have been unreasonable for Congress to provide additional protections for federal government employees to hold itself out as an exemplar of equal treatment. Given that there are likely plausible arguments that could be articulated as to why Congress might provide more protection, as well as plausible arguments that could be articulated as to why Congress might provide less protection—we do not rely heavily on either. Instead, we are forced to determine intent through the language Congress used, in the context of broader understandings of the legislative backdrop against which the legislated.

Given these findings, we are convinced the ADEA does not require a "but-for" causation standard.

III

Because we find the ADEA's federal sector provision to be sufficiently unambiguous in not requiring a "but-for" standard of causation, there is no need to conduct a *Chevron* analysis. *Chevron, U.S.A., Inc. v. Natural*

Resources Defense Council, Inc., 467 U.S. 837 (1984). However, we note that in the forty-plus years since the ADEA was passed, neither the Equal Employment Opportunity Commission (EEOC), nor its predecessor the Civil Service Commission, have required "but-for" causation in implementing regulations or in adjudications. Even without conducting a *Chevron* analysis, we acknowledge that the agencies' longstanding view of the federal-sector provisions is relevant under *Skidmore*, further supporting our aforementioned conclusion. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

IV

Although we did not originally grant certiorari on the question as to what standard of causation is applicable to causes of action under 29 U.S.C. § 633a(a), we now find it proper to address this question.

Until this point, we have only determined a "but-for" causation standard is precluded by the text of 29 U.S.C. § 633a(a). But we recognize the language of the text does not clearly affirmatively require a particular standard. Despite this challenge, given the antidiscrimination scheme that has been established by both Congress and the Court's prior precedent, we believe the adoption of an existing standard is proper.

As we have already discussed, the language of 29 U.S.C. § 633a(a) is quite broad and "sweeping" in nature. *Forman*, 271 F.3d at 296. On this basis, we find the motivating-factor, or mixed-motive, standard best covers the extensive range of potential violations protected against in the text of 29 U.S.C. § 633a(a). We agree with the Eleventh Circuit's analysis as to what a motivating factor analysis requires a plaintiff to prove to sustain a cause of action under a motivating-factor standard. *Babb v. Secretary, Department of Veterans Affairs*, 743 F. App'x 280, 286 (11th Cir. 2018) (citing *Quigg v. Thomas County School District*, 814 F.3d 1227, 1239 (11th Cir. 2016) (finding "a plaintiff need only offer 'evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was *a*

motivating factor for the defendant's adverse employment action.'")).

Therefore, we hold causes of action brought under 29 U.S.C. § 633a(a) should be evaluated under a motivating-factor standard.

* * *

Because the plain text as well as the origins, history, and context of the ADEA's federal-sector provision, 29 U.S.C. § 633a(a), do not support a "but-for" causation standard, we hold the district court erred in finding Babb's age discrimination claims subject to the *McDonnell Douglas* standard rather than a motivating factor standard. Accordingly, we vacate and remand for further proceedings consistent with this opinion.

It is so ordered.

Applicant Details

First Name	**Ciara**
Middle Initial	**N**
Last Name	**Cooney**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **811 4th St NW** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**7039753415**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 21, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**American Criminal Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William E. Leahy Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

CIARA COONEY
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June 11, 2023

The Honorable Tanya Chutkan
United States District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave, N.W.
Washington, D.C. 20001

Dear Judge Chutkan:

I am a recent Georgetown University Law Center graduate and I am applying for a clerkship in your chambers for the term beginning in 2024.

My strong desire is to serve indigent and incarcerated individuals navigating the legal system. At Georgetown, I sought experiences that cultivated this passion. I served as a legal extern for Rights Behind Bars and as a student attorney in the Appellate Courts Immersion Clinic. In the clinic, I had the unique opportunity to argue one of our cases before the D.C. Circuit. I take great joy in the process of deconstructing arguments, analyzing complex legal concepts, and thinking strategically about how to frame cases.

Above all, I am driven by curiosity and eager to continue learning. I would be honored to serve as your law clerk. My resume, law school transcript, and writing sample are enclosed. You will also be receiving letters of recommendation from Professors Brian Wolfman (202-661-6582), Mary McCord (202-661-6607), Julie O'Sullivan (202-662-9394), and Rima Sirota (202-662-6728) on my behalf. Thank you for your consideration.

Respectfully,

Ciara Cooney

CIARA COONEY

cnc63@georgetown.edu • (703) 975-3415 • 811 4th St NW, Unit 514, Washington D.C. 20001

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER, J.D., *magna cum laude* May 2023

GPA: 3.90

Activities: William E. Leahy Moot Court Competition (Best Advocate)
American Criminal Law Review (Volume 60 Managing Editor)
Supreme Court Institute (Research Assistant)
Professor Rima Sirota (Research Assistant for Legal Practice)

Honors: Order of the Coif
Associate Dean's Award for Excellence in Clinic, Professor Brian Wolfman
CALI Award for Excellence in Criminal Justice, Professor Julie O'Sullivan

Publications: *Anything but Compassion: The Conflict Between Exhaustion and Compassionate Release*, 61 Am. Crim. L. Rev. __ (forthcoming 2023)
Discourse YouTube Series, Episode 01: Originalism (Moderator) (link)

UNIVERSITY OF VIRGINIA, B.A. with High Distinction in Public Policy & Leadership May 2017

Capstone: *Issues Impacting the Aging, Low-Income Population in Albemarle County*

EXPERIENCE

U.S. COURT OF APPEALS, TENTH CIRCUIT Aug. 2025–2026 (forthcoming)
Law Clerk to the Hon. Scott M. Matheson, Jr.

APPELLATE COURTS IMMERSION CLINIC, Washington, D.C. Jan.–May 2023
Student Attorney

- Argued before D.C. Circuit panel on whether a statutory filing deadline was a nonjurisdictional, claim-processing rule and whether equitable tolling was appropriate (link to argument audio).
- Co-authored briefs addressing the Civil Service Reform Act's jurisdictional requirements and equitable tolling; *Younger* abstention; and compassionate release.

RIGHTS BEHIND BARS, Washington, D.C. Sept.–Nov. 2022
Legal Extern

- Drafted opening brief section on Eighth Amendment deliberate indifference to medical needs; provided research on ADA liability and religious freedom protections in prisons.

KAPLAN HECKER & FINK LLP, New York, NY May–July 2022
Summer Associate; Law Clerk (forthcoming Sept. 2023)

- Drafted reply brief section on Prison Litigation Reform Act's three-strikes rule.
- Researched and wrote memoranda on legal issues including liability for defamation, Title IX developments, judicial review of arbitration, and federal and state criminal procedure.

GEORGETOWN ICAP, Washington, D.C. Aug.–Dec. 2021
Constitutional Impact Litigation Practicum Student

- Authored memorandum on a circuit split under Federal Rule of Civil Procedure 15(c); provided research for amicus brief on DACA's public safety benefits.

OFFICE OF THE PUBLIC DEFENDER, Arlington, VA May–July 2021
Legal Intern

- Drafted motion to suppress evidence collected from a vehicle on Fourth Amendment grounds.

PERSONAL

- Fledgling sketch-artist. Avid reader. Flat-white enthusiast. British, Irish, and American citizen.

Record of: Ciara Noelle Cooney
GUID: 802370126

GEORGETOWN UNIVERSITY
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WASHINGTON, D.C. 20001
(202)662-9220

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 07, 2023
Georgetown University Law Center
Major: Law

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	001	11	Civil Procedure Charles Abernathy	4.00	A-	14.68	
LAWJ	004	11	Constitutional Law I: The Federal System Josh Chafetz	3.00	A-	11.01	
LAWJ	005	12	Legal Practice: Writing and Analysis Diana Donahoe	2.00	IP	0.00	
LAWJ	008	11	Torts Girardeau Spann	4.00	A	16.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	41.69	3.79
Cumulative	11.00	11.00	41.69	3.79

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	002	11	Contracts Anupam Chander	4.00	A-	14.68	
LAWJ	003	11	Criminal Justice Julie O'Sullivan	4.00	A+	17.32	
LAWJ	005	12	Legal Practice: Writing and Analysis Rima Sirota	4.00	A+	17.32	
LAWJ	007	91	Property Madhavi Sunder	4.00	A-	14.68	
LAWJ	1701	50	International Economic Law and Institutions Sean Hagan	3.00	A	12.00	
LAWJ	611	04	Restorative Justice: Law and Policy Intersections Thalia Gonzalez	1.00	P	0.00	

Dean's List 2020-2021

	EHrs	QHrs	QPts	GPA
Current	20.00	19.00	76.00	4.00
Annual	31.00	30.00	117.69	3.92
Cumulative	31.00	30.00	117.69	3.92

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	025	07	Administrative Law Glen Nager	3.00	A	12.00	
LAWJ	1601	01	Constitutional Impact Litigation Practicum (Project-Based Practicum) Mary McCord	5.00	A	20.00	
LAWJ	215	08	Constitutional Law II: Individual Rights and Liberties Louis Seidman	4.00	A	16.00	
LAWJ	317	05	Negotiations Seminar Kondi Kleinman	3.00	A	12.00	

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	60.00	4.00
Cumulative	46.00	45.00	177.69	3.95

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	165	07	Evidence Mushtaq Gunja	4.00	A-	14.68	
LAWJ	1655	05	Criminal Justice Reform Seminar Shon Hopwood	3.00	A	12.00	
LAWJ	361	09	Lawyers' Ethics Abbe Smith	2.00	B+	6.66	
LAWJ	455	01	Federal White Collar Crime Julie O'Sullivan	4.00	A	16.00	

Dean's List 2021-2022

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	49.34	3.80
Annual	28.00	28.00	109.34	3.91
Cumulative	59.00	58.00	227.03	3.91

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	1447	08	Mediation Advocacy Seminar Kelly Walsh	2.00	A-	7.34	
LAWJ	1491	01	Externship I Seminar (J.D. Externship Program) Sandeep Prasanna		NG		
LAWJ	1491	119	~Seminar Sandeep Prasanna	1.00	A-	3.67	
LAWJ	1491	121	~Fieldwork 3cr Sandeep Prasanna	3.00	P	0.00	
LAWJ	1631	05	Federal Practice Seminar: Contemporary Issues Irving Gornstein	2.00	A	8.00	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	A-	11.01	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	11.00	8.00	30.02	3.75
Cumulative	70.00	66.00	257.05	3.89

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	049	05	Appellate Courts and Advocacy Workshop	2.00	A	8.00	
LAWJ	1538	05	Constitutional Law: The First and Second Amendments	1.00	P	0.00	
LAWJ	504	05	Appellate Courts Immersion Clinic		NG		
LAWJ	504	30	~Writing	4.00	A-	14.68	
LAWJ	504	80	~Research and Analysis	4.00	A	16.00	
LAWJ	504	81	~Advocacy & Client Relations	4.00	A	16.00	
Transcript Totals							

	EHrs	QHrs	QPts	GPA
Current	15.00	14.00	54.68	3.91
Annual	26.00	22.00	84.70	3.85
Cumulative	85.00	80.00	311.73	3.90

End of Juris Doctor Record

This electronic seal and signature serve as official certification on the following document.

Cornelia Gustafson
Interim Assistant Dean & Registrar

08-JUN-2023

GEORGETOWN UNIVERSITY LAW CENTER
EXPLANATION OF GRADING SYSTEM

Student matriculating in Fall 1998 or later

GRADE	Quality Points
† A+	4.33
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D	1.00
F	0.00

Averages are rounded to two decimal places.

Students who matriculated prior to Fall 1998

GRADE	Quality Points
A	12.000
A-	11.000
B+	10.000
B	9.000
B-	8.000
C+	7.000
C	6.000
C-	5.000
D	3.000
F	0.000

Averages are carried to three decimal places.

Center for Transnational Legal Studies-London Prior to Fall 2011 ‡

GRADE	Explanation
05	Outstanding
04	Excellent
03	Good
02	Fair
01	Fail

‡ Fall 2011 through Summer 2012, the Center for Transnational Legal Studies awarded the grades from 5.0 (highest score) to 1.0 (failing score), in 0.5 increments.

† In Fall 2009, the faculty established a grade of A+ for truly extraordinary academic performance in a law school class. From Fall 2009 to Spring 2020, the A+ grade carried quality points of 4.00. Beginning Summer 2020, the A+ grade carries quality points of 4.33.

An average may be computed by multiplying the numerical equivalent of each letter grade by the credit value of the course, then dividing the total thus obtained by the total number of quality hours (QHRS).

A semester is 13 weeks of class meetings. Class periods are 55 minutes per credit.

Grades for courses taken at other institutions appear on the student's transcripts but are not computed into the Law Center's average.

Current Grading Symbols

AF -Administrative F* (The student failed to take the examination or complete other course requirements.)
AP -Administrative Pass** (The student passed the course but did not stop writing before the time allowed for the examination expired.)
AU -Audit (non-degree only)**
CR -Administrative Credit**
IP -Course in Progress**
NG -Non-Graded Course**
NR -Grade Not Recorded**
P -Pass **
H -Honors**
W -Withdrawal**

Prior Grading Symbols

EW -Excused Withdrawal
PR -Proficient
S -Satisfactory
U -Unsatisfactory
NC -No Credit

Other Symbols

EHRS - Earned Hours
LW - Legal Writing Requirement
QHRS - Quality Hours
QPI - Quality Point Index
QPTS - Quality Points
RC - Residency Requirement
R - Include/Exclude Credit

* Included in quality hours and grade point average.
** Not included in quality hours or grade point average.

Inquiries may be addressed to:
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600 New Jersey Avenue, N.W. Washington, D.C. 20001
Tel: (202) 662-9220 Fax: (202) 662-9235
lawreg@law.georgetown.edu

Send To : CIARA COONEY

Georgetown Law
Institute for Constitutional Advocacy and Protection
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

We write to express our enthusiastic support for Ciara Cooney's application to serve as a law clerk in your chambers. Ciara's performance in the Constitutional Impact Litigation Practicum-Seminar that we co-taught in the fall of 2021 was consistently exceptional. Her clear and cogent writing style, professionalism, and ability to operate across a broad range of substantive legal areas would hold her in good stead in any judge's chambers.

The Practicum-Seminar is a 5-credit course that involves law students in the work of the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law. ICAP is a public interest law practice within the law school that pursues constitutional impact litigation in courts across the country. Ciara not only produced outstanding work in each case on which she worked, but she did so in a professional and efficient manner that will serve her well as a young lawyer. She earned an A in this rigorous course.

At ICAP, we try to give our best students, like Ciara, a broad range of work that allows them to develop their legal skills as they demonstrate their talents. Among other assignments, Ciara researched a circuit split involving the application of the relation-back rule of Fed. R. Civ. P. 15(c)(1)(C) where the identity of a defendant is unknown to the plaintiff at the time the complaint is filed. Because of her exceptional work on this research, we asked her to draft a portion of what later became a petition for certiorari in *Herrera v. Cleveland*. Ciara's research demonstrated her attention to detail and her analysis was clear, thorough and well written. Indeed, it led us to assign her the first draft of an amicus brief for filing in the Fifth Circuit in *Texas v. United States*, a case involving a challenge to the creation of the DACA program. The brief was on behalf of a bipartisan group of current and former prosecutors and, although Ciara was able to work from an earlier amicus brief that ICAP had filed in the Supreme Court in the challenge to the rescission of DACA, this new brief required substantial updating and an entirely new section of argument. Ciara's research was again extremely thorough and her writing exceptional. She also mastered the Fifth Circuit's rules so that our brief was in compliance.

Besides her work on *Herrera* and *Texas v. United States*, Ciara completed half of a 50-state survey of state commitment and release procedures following a not-guilty-by-reason-of-insanity (or equivalent) verdict. This detailed and substantial work product will help ICAP assess whether potential litigation in this area may be warranted.

Worth mentioning, as well, is the careful attention to detail that Ciara displayed in performing even mundane tasks like citechecking and proofreading ICAP briefs before filing. Ciara recognized the importance of scrupulous accuracy and adherence to bluebooking rules. We have no doubt that her skills across the board will make her a valuable asset in chambers.

Finally, in addition to Ciara's significant contributions to ICAP's work, Ciara was also a thoughtful contributor to our weekly seminar. The seminar covers topics such as threshold barriers to constitutional litigation (standing, abstention, etc.), legal theories under different constitutional provisions (due process, equal protection, First Amendment, etc.), and strategic considerations in impact litigation, among other things. Ciara was consistently well prepared and her contributions in these weekly discussions revealed her deep engagement with the material.

Together we have clerked at all three levels of the federal judiciary and, based on that experience, we believe that Ciara would be a welcome addition to any judge's chambers. She is mature, collegial, and thoughtful. Her legal writing is well organized and crisply articulated. And her flexibility across substantive legal areas is top-notch. We anticipate an impressive legal career ahead for Ciara.

We would be delighted to answer any further questions that you might have. Thank you for considering Ciara's application.

Respectfully submitted,

Mary B. McCord
Executive Director & Visiting Professor of Law
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Kelsi Brown Corkran
Supreme Court Director & Senior Lecturer
kbc74@georgetown.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I write to recommend Ciara Cooney for a judicial clerkship. Ms. Cooney was the top student in my Legal Practice class during her first year at Georgetown Law, and she was an exceptional research assistant for me in her second year.

Legal Practice is a year-long legal research and writing course, organized so that students research and write (and re-write, and re-write again) a number of increasingly complex assignments throughout the year. The Fall semester focuses on objective memoranda, while in the Spring we turn to persuasive advocacy. Throughout the year, I also include a number of smaller units designed to introduce students to other practical lawyering skills such as oral argument and writing for a variety of audiences.

Ms. Cooney earned the highest total score out of fifty-one students and an A+ grade. She excelled on every measure. For example, I had students independently research and write a complex appellate brief on a witness identification issue at the end of the spring semester. Ms. Cooney's submission was so accomplished that I posted it for the entire class as a model of what I was looking for. Additionally, Ms. Cooney earned top marks on timeliness, participation, attendance, and effort on ungraded assignments; these professionalism qualities are sometimes overlooked and undervalued by law students, but not by Ms. Cooney.

Given her performance in my Legal Practice class, Ms. Cooney was an easy pick to be my part-time research assistant during the fall semester of her second year. I made an excellent choice. To help me prepare an upcoming writing problem for my first-year students, Ms. Cooney researched and wrote an appellate brief for one side in a Terry stop matter. Ms. Cooney worked independently, coming to me with questions only after she had thought them through. Our conversations and her final work product resulted in a far more focused and manageable writing problem for my students.

In addition to working as my research assistant, she was also selected as a research assistant for Georgetown's Supreme Court Institute. I asked the Director of the Institute about Ms. Cooney's performance in this role, and her experience with Ms. Cooney echoes my own:

> Ciara has demonstrated the highest level of responsibility, reliability, integrity, maturity, discretion, and professional demeanor. She is consistently responsive, knows when to ask questions, is fastidious about details, and meets deadlines without reminders. Ciara has stood out among her peers for her enthusiasm and positivity and has been an exceptional collaborator in ensuring the success of our program. I could not be happier that she accepted my offer to serve as an RA for the Supreme Court Institute for a second year.

Throughout law school, Ms. Cooney continued to seize opportunities to further hone her research and writing skills. She was elected Managing Editor of the American Criminal Law Review, which also published her note on exhaustion and compassionate release. Through the Appellate Courts Immersion Clinic, Ms. Cooney argued to the D.C. Circuit that a thirty-year-old precedent should be overturned, and she helped draft several of the briefs. Shortly before graduation, Ms. Cooney was invited to moderate a discussion on originalism between Georgetown's Dean and the Executive Director of Georgetown's Center for the Constitution.

I asked Ms. Cooney why she is seeking a clerkship. She cited her love of problem-solving and the opportunity to learn how advocates and judges shape the law. She also believes quite simply that she would be good at it and would enjoy it. Based on my experience with Ms. Cooney, that is absolutely right. She is detail-oriented, reliable, an effective researcher, and a clear and concise writer; she is clear-eyed in assessing the strengths and weaknesses of legal arguments; and her positive attitude is second to none.

I recommend Ms. Cooney to you with no hesitation.

Sincerely,

Rima Sirota

Rima Sirota - rs367@law.georgetown.edu - (202) 353-7531

GEORGETOWN LAW

Brian Wolfman
Professor from Practice
Director, Appellate Courts Immersion Clinic

June 7, 2023

Re: Clerkship recommendation for **Ciara Cooney**

I enthusiastically recommend Ciara Cooney to serve as your law clerk.

I got to know Ciara in the spring semester of 2023 when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I comment on Ciara's work in the seminar later in this letter.) I worked with Ciara nearly daily for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom-line recommendation: Ciara would be an excellent law clerk. Ciara's work in our clinic was very strong. Her legal analysis was generally spot on. She never looked for easy ways out of tough legal problems. Her writing was clear and straightforward. Ciara works hard. She was highly dedicated to her clients and was a terrific colleague to the other students and her clinic mentors.

For these reasons, I awarded Ciara the Associate Dean's Award for Excellence in Clinic—which I give to only two students over the entire academic year. This award is the highest graduation recognition that a Georgetown Law clinic student can achieve. According to the school "this award recognizes students who are nominated by their clinic faculty

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wolfmanb@law.georgetown.edu

supervisors and acknowledges their exceptional work as student attorneys on behalf of the clinic's clients."

I'll turn now to Ciara's major clinic projects. First, Ciara was asked to write a reply brief to the D.C. Circuit in an appeal seeking to topple a decades-old circuit precedent holding that a statute of limitations applicable in certain employment-discrimination suits is "jurisdictional" and therefore not subject to equitable tolling. Working with two other students, Ciara explained why, under circuit procedures, the prior precedent could be overruled by a panel without input from the en banc court. The team also argued that, under the particular circumstances of the case arising from the pandemic, the deadline should be tolled. Ciara did an excellent job researching and writing the brief. Ciara also had the rare opportunity as a student to argue the appeal to the D.C. Circuit. Ciara prepared painstakingly. We mooted her almost daily for nearly three weeks. She mastered the record. She tracked down and read every authority. After each moot court, she responded to feedback and improved her presentation. She did all this while maintaining full responsibility for her other pending clinic project (the cert petition described below). Ciara did a beautiful job with the argument.

Ciara's other two projects were equally challenging. She was asked to draft a petition for rehearing en banc involving the intersection of the Sixth Amendment speedy-trial right and *Younger* abstention. We were starting largely from scratch because the clinic hadn't handled the case at the panel stage. The issues would have been difficult for most practicing lawyers, yet Ciara understood them quickly, and she, along with two colleagues, produced a first-rate petition.

Ciara's final project was her largest. Again working with two other students, Ciara prepared a petition for a writ of certiorari on the question whether a prisoner's petition for compassionate release under the First Step Act may rely on legal errors in the prisoner's underlying criminal proceedings or whether those errors may be considered only on habeas review. The case is pending, and confidentiality concerns preclude me from disclosing much more. Suffice it to say that crafting a brief based on the traditional pedestals of cert-worthiness—a circuit conflict, the importance of the question presented, etc.—is an unusual task for a student. Yet Ciara quickly understood how this project differed from writing a normal appellate brief. She brought surprising sophistication to the assignment, along with the clear writing and analytical prowess I've already described.

* * *

As noted at the beginning of this letter, my clinic students are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy Workshop. The first two-thirds of the course is an intensive review of basic federal appellate law doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, students must master the difficult doctrinal material and apply it in a half dozen challenging writing assignments. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire federal clerkships. Ciara's work in this class was consistently strong. On the most difficult assignment—a motion to dismiss for lack of appellate jurisdiction arising from a complex mass-tort class action—Ciara received a 3.9 on a 4.0 scale, the second highest grade in the course. Overall, Ciara earned an "A" in a class of high-preforming students.

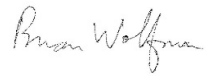
* * *

I want to address a few of Ciara's attributes beyond her pure legal ability.

Ciara generally operates independently. She tries to figure things out on his own—and generally succeeds—but she also knows when to contact mentors to seek guidance. As already indicated, she's a hard worker, and, even when under pressure, she stays on task and completes the job without getting rattled. Ciara is also honest and forthright and is willing to disagree with colleagues and mentors because she wants to get the job done right. Ciara also works very well with colleagues and mentors and has a great sense of humor. In short, she will be an excellent addition to any judicial chambers.

As I said at the beginning, I recommend Ciara Cooney for a clerkship with enthusiasm. If you would like to talk about Ciara, please call me at 202-661-6582.

Sincerely,



Brian Wolfman

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 2022

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I write to recommend Ciara Cooney to you with all the enthusiasm that decorum permits. Ciara is simply terrific—as a student and as a person.

Ciara (pronounced “Keera”) is very, very bright, and is at the very top of a large and competitive class. If she keeps up the good work and her GPA (3.95 as of this writing), I imagine she will be more than competitive for summa cum laude honors at graduation (last year, the cut-off for magna (top 10%) honors was 3.78). Ciara was enrolled in my Criminal Justice in the spring 2021 semester and earned the best exam out of 59 students, garnering one of the only grades of “A+” I have ever awarded. She again easily earned an “A” in my Federal White Collar Crime class this semester.

We teach basic constitutional criminal procedure in our first year Criminal Justice class, covering the Fourth, Fifth, and Sixth Amendments. Ciara’s exam rivaled my grading sheet and, given that I have been teaching the subject-matter for 26 years and wrote the exam, her performance was spectacular. Ciara knew the voluminous subject-matter cold, showcased outstanding analytical abilities, and demonstrated surprisingly (for her age) mature and balanced judgment in resolving close questions.

The spring semester was conducted entirely by zoom but it was a wonderful class, in great part because of Ciara’s participation. She is not a “gunner”; she was judicious in her contributions but she was clearly engaged in the discussion and volunteered often. At one point in the semester, a controversy arose because one of our adjuncts was recorded making racially offensive statements. I offered the students the opportunity to come to what I termed a “listening session,” during which I wanted to hear from them about the controversy and any other concerns they had about the institution or our classroom environment. Ciara was the only white student to show up, and she, too, was there to listen and learn.

Ciara enrolled this last semester in my Federal White Collar Crime class. This course provides a deep dive into a number of frequently charged federal statutes, including perjury, false statements and claims, fraud of all varieties, conspiracy, public corruption (§ 201, the Hobbs Act, and the Foreign Corrupt Practices Act), RICO, and money laundering. We also cover subjects such as mens rea, corporate criminal liability, the U.S. Sentencing Guidelines, grand jury practice, discovery, Fifth Amendment as applied to testimony (and immunity issues) and tangible objects, plea bargaining, parallel proceedings, and the extraterritorial application of criminal statutes. In short, it is a very demanding class in terms of both subject-matter and the sheer volume of law and required reading. Again, Ciara wrote just a terrific exam. Her “A” reflected a comprehensive knowledge of complex materials, terrific analytical ability, and good judgment in resolving close questions.

Unlike most of my students, Ciara is interested in starting her career on the public defense side. This is born of her experiences at two firms engaging in both federal white-collar defense work and the pro bono defense of a Nigerian national incarcerated in the U.K. and fighting extradition to the United States to face credit card fraud charges. Ciara’s ambition was, until those experiences, to become an AUSA, but observing the different processes and outcomes applied to wealthy, as opposed to low-income, defendants caused her to reassess. She felt that many prosecutors were deaf to facts that conflicted with their theory of guilt, presumed guilt rather than innocence, and were dismissive of the humanity of their targets and indifferent to the human impact of their choices. Although I am a former federal prosecutor, I have encouraged Ciara in her ambition because it is the product of experience and a deep commitment to a fair criminal process. She has the extraordinary gifts and passion to ensure that justice is fairly done in our courtrooms by putting prosecutors to the test.

I know personal chemistry is hard to forecast, but I will say that I have found Ciara to be refreshingly straightforward, unassuming, and earnest. And I have truly enjoyed all my many interactions with her. Ciara has a good sense of humor and is a lively and interesting person—and someone I believe will be a very positive presence in chambers. In this regard, I know that many judges like to know a little more about the backgrounds of applicants they are considering inviting into the chambers family and perhaps I can offer some information of value.

Ciara was born in a village in the British countryside to an American mother and an Irish father. Her family immigrated to the United States when she was 9, and she remains cosmopolitan in attitude. She aspires to travel more widely than her father, who has lived in 5 countries and traveled to more than 65. Despite the pandemic, Ciara’s current record of traveling to 27 countries shows her commitment to this endeavor. It is Ciara’s mother, however, who is her role model. Ciara describes her mom as a force of nature, beloved by all. A corporate immigration lawyer who runs a large office and is the family breadwinner, Ciara’s mother somehow got three kids off to school every day and cooked dinner every night. Ciara says that her mom would show up at all Ciara’s field hockey games, running across the field in kitten heels and hauling a briefcase or two bulging with work. Ciara professes herself “dumbfounded” by her mother’s ability to balance everything and aspires to model her mother’s strength and kindness. I believe that Ciara is well on her way. She has modeled a conscientious commitment to others who need her help by

Julie O'Sullivan - osullij1@law.georgetown.edu

undertaking to tutor first-year students. She works very hard, but never at the sacrifice of friendships or family.

I apologize for going on at such length, but I belief that Ciara is a star. She has the native smarts, developed skills, passion, personality, and values to be an extraordinary clerk. And she is someone who you will be delighted—and proud—to mentor in the years ahead.

Sincerely yours,

Julie R. O'Sullivan
Agnes Williams Sesquicentennial Professor

CIARA COONEY
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WRITING SAMPLE

The attached writing sample is a final paper submitted for my seminar course, Federal Practice: Contemporary Issues, co-taught by Professor Irv Gornstein and Judge Cornelia Pillard. The paper discusses the development of the major questions doctrine and seeks to identify a judicially-administrable standard post-*West Virginia v. EPA*, 142 S. Ct. 2587 (2022). I am the sole author of this work and it has not been edited by anyone else.

WHAT MAKES A QUESTION MAJOR?—IDENTIFYING A JUDICIALLY ADMINISTRABLE MAJOR QUESTIONS STANDARD AFTER *WEST VIRGINIA V. EPA*

INTRODUCTION

The major questions doctrine, which has been looming in the wings of administrative law for several decades, took center stage in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). There, the Supreme Court determined that the Environmental Protection Agency (EPA) lacked authority under the Clean Air Act to establish a "best system of emission reduction" that would result in a "sector-wide shift in electricity production from coal to natural gas and renewable."[1] In doing so, the highly-anticipated decision confirmed the major questions doctrine is an independent canon of construction for courts reviewing administrative agency actions. While the decision justified the need for a major questions doctrine and detailed how a major questions analysis should proceed, it did not explain when a major questions analysis is necessary. Phrased differently, what makes a question major? This Paper seeks to provide a judicially-administrable analytical framework for identifying major questions. The Court's articulation of the major questions test in *West Virginia v. EPA* is the starting point and a close analysis of the major questions doctrine's foundations provides further clarification.[2]

Part I discusses the major questions doctrine's foundations and interrelated judicial review principles, specifically, the nondelegation doctrine and *Chevron* deference. Part II briefly summarizes *West Virginia v. EPA* and explains the nuances between the majority's major

[1] 597 U.S. ___, 142 S. Ct. 2587, 2603 (2022).

[2] As a threshold matter, this Paper accepts the existence of the major questions doctrine, as developed by the Supreme Court's jurisprudence and formally recognized in *West Virginia v. EPA*. This Paper does not address legitimate arguments that *West Virginia v. EPA*, and the major questions doctrine generally, is an erroneous departure from traditional statutory interpretation principles. Justice Kagan effectively made that argument in dissent and it has been further articulated by academics. *See West Virginia v. EPA*, 142 S. Ct. at 2633-34 (Kagan, J., dissenting); *see also, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263-64. Rather, this Paper accepts the validity of the major questions doctrine and seeks to derive a legitimate and administrable standard for identifying major questions cases.

questions standard and Justice Gorsuch's alternative approach, presented in concurrence. Part III first identifies several incorrect approaches to identifying major questions cases arising in the courts of appeals post-*West Virginia v. EPA*. These approaches conflict with the major questions doctrine or lack judicial administrability. Part IV then proposes the following judicially-administrable, element-based test to determine when a major questions analysis is needed. A major questions case requires two distinct elements: (1) a novel and extensive agency action based on the history and breadth of the agency's authority; *and* (2) the agency action implicates issues of great political and economic significance.[3] The factors considered in *West Virginia v. EPA* and their "common threads"[4] in prior cases reveal how the elements are satisfied. Requiring a sufficient showing of both elements ensures only "extraordinary cases" where "common sense" suggests Congress may not have delegated the authority at issue prompt a major questions analysis.[5] This approach, implicit in *West Virginia v. EPA*, has subsequently been endorsed by the U.S. Court of Appeals for the D.C. Circuit.[6]

I. THE FOUNDATIONS OF THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine falls within the broader framework for judicial review of agency action. There are two foundational principles of judicial review critical to understanding the major questions doctrine: delegation of authority to administrative agencies and *Chevron* deference. This Part will (A) provide a brief synopsis of delegation principles and the relationship to judicial review; (B) explain the deferential standard of review established by *Chevron*; and (C) trace the subsequent development of the major questions doctrine.

[3] 142 S. Ct. at 2608.
[4] *Id.* at 2609.
[5] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[6] *See* Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 363–64 (D.C. Cir. 2022).

A. Congressional Delegation and Judicial Review of Agency Action

Separation of powers principles are derived from the vesting clauses of the U.S. Constitution, which assign all executive, legislative, and judicial powers to the corresponding branches.[7] The vesting of legislative power in Congress has been determined to include "a bar on its further delegation."[8] This prohibition on Congressional delegation of "powers which are strictly and exclusively legislative" is referred to as the nondelegation doctrine.[9]

To abide by the nondelegation doctrine, Congress must include an "intelligible principle" in the authorizing statute to guide the executive agency.[10] The intelligible principle standard is viewed broadly and Congressional delegations of authority to the executive branch have almost uniformly been upheld.[11] Congress has violated the nondelegation doctrine on only two occasions in 1935.[12] Since then, the Court has consistently upheld Congressional delegations of authority to executive agencies, prompting scholars to argue the nondelegation doctrine is a separation of powers red herring.[13] But some justices appear interested in reinvigorating the nondelegation doctrine. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), a plurality upheld Congress's delegation of authority to the Attorney General to determine how the Sex Offender Registration and Notification Act (SORNA) applied to sex offenders convicted prior to passage of SORNA.[14] Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented and called for the

[7] Article I of the Constitution provides "[a]ll legislative Powers … shall be vested in a Congress of the United States." U.S. Const. art I, §1. Article II then vests the executive power in the President, U.S. Const. art II, §1, and Article III vests the judicial power in the Supreme Court, and inferior courts created by Congress, U.S. Const. art. III, §1. *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PENN. L. REV. 379, 389 (2017).
[8] *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality).
[9] *See id.*; 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 11:13 (3d ed. 2022).
[10] *Gundy*, 139 S. Ct. at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).
[11] *See* Whittington & Juliano, *supra* note 7, at 392-406.
[12] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[13] *See generally* Whittington & Juliano, *supra* note 7; Eric A. Posner & Adrian Vermuele, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).
[14] *Gundy*, 139 S. Ct. at 2121–24.

Court to "revisit" the nondelegation doctrine.[15] According to Justice Gorsuch, the Court has not been fulfilling its "obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities."[16] He proposed a more stringent standard for the "intelligible principle" test.[17] Concurring in the judgment in *Gundy*, Justice Alito also expressed his "support" for a reconsideration of the Court's approach, which has "uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[18]

Whether or not the Court bolsters the nondelegation doctrine, it frames the major questions doctrine because it defines the outer limits of authority that may be delegated to an agency. Congress cannot delegate "powers which are strictly and exclusively legislative,"[19] but Congress also "cannot do its job absent an ability to delegate power under broad general directives."[20] Within these hazy and indeterminate constraints, the Court has recognized an area of permissible delegation. As discussed further *infra*, the major questions doctrine is then a tool to determine whether Congress in fact delegated the authority asserted by the agency.

B. Chevron *Deference: Implicit Delegation*

Congress delegates powers to administrative agencies by authorizing the agency to administer statutes.[21] The agencies then "make all sorts of interpretive choices" about the statutes they administer.[22] Yet, it is emphatically the "province and duty" of the courts to determine "what the law is."[23] Therefore, prior to 1984, it was "universally assumed" that courts had the ultimate

[15] *Id.* at 2131 (Gorsuch, J., concurring).
[16] *Id.* at 2135.
[17] *Id.* at 2141.
[18] *Id.* at 2130–31 (Alito, J., concurring in the judgment).
[19] Wayman v. Southard, 23 U.S. 1, 42 (1825).
[20] Mistretta v. United States, 488 U.S. 361, 372 (1989).
[21] United States v. Mead Corp., 533 U.S. 218, 227 (2001).
[22] *Id.*
[23] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

"pronounc[ement] on the meaning of statutes."[24] Administrative agencies interpretations could receive some deference, but only to the extent they were persuasive.[25] Then, in an unsuspecting landmark case, the Court announced "a new approach to judicial review of agency interpretations of law."[26] *Chevron U.S.A. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984), held that courts must to defer to administrative agencies reasonable interpretations of ambiguous statutes that they administers.[27] Judicial deference was justified by an "implicit rather than explicit" delegation to of authority to the agency.[28] *Chevron* "vastly expanded the sphere of delegated agency lawmaking" by determining that Congress "impliedly delegated primary authority to [agencies] to interpret [ambiguous] statute[s]."[29]

The reaction to *Chevron* deference has been vehement and lasting.[30] Current critics argue it is an afront to the Constitution and undermines separation of powers. For instance, Justice Thomas views *Chevron* deference as in tension with Article III's vesting clause because it "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over the to the Executive."[31] And Justice Kavanaugh, while serving on the D.C. Circuit, criticized *Chevron* deference as an "atextual intervention by courts" that "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[32] While *Chevron* still remains good law, the

[24] *See* Thomas W. Merrill, *The Story of* Chevron, 66 Admin. L. Rev. 254, 257 (2016).
[25] *See* Skidmore v. Swift & Co., 323 US. 134 (1944).
[26] Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 189 (2006).
[27] 467 U.S. 837, 842 (1984).
[28] *Id.*
[29] Merrill, *supra* note 24, at 256.
[30] *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L. J. 1613, 1615–20 (2019).
[31] Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
[32] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016).

Court has sought to significantly limit its scope.[33] The major questions doctrine arose as one of these limiting principles.[34]

C. The Development of a Major Questions Doctrine

In *West Virginia v. EPA*, the Court formally "announce[d] the arrival of the 'major questions doctrine.'"[35] But the roots of the major questions doctrine trace back almost three decades.[36] Although the "Court ha[d] never even used the term 'major questions doctrine'" before *West Virginia v. EPA*,[37] the "'label' … took hold because it refer[ed] to an identifiable body of law" with common threads recognized by scholars and jurists.[38] The major question doctrine seemingly sought to address (1) which institution should have comparative authority, the judiciary or the executive agency, to interpret the scope of statutory delegations, as governed by *Chevron* deference; and/or (2) the permissible scope of Congressional delegations to administrative agencies, as restrained by the nondelegation doctrine.

The major questions doctrine was initially presented as a *Chevron* deference limit. In *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Federal Communications Commission was not entitled to *Chevron* deference because the Commission's interpretation of the term "modify" in Section 203 of the Communications Act went "beyond the meaning that the statute [could] bear."[39] The Court then held that the FCC lacked authority under the Communications Act to adopt the proposed policy because it was "a fundamental revision of the

[33] *See, e.g.*, James Kunhardt & Anne Joseph O'Connell, *Judicial deference and the future of regulation*, BROOKINGS INST. (Aug. 18, 2022) https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/ (identifying the major questions doctrine as a limit placed on *Chevron* deference).
[34] *See, e.g.*, Sunstein, *supra* note 30, at 1676–76 (explaining the major question doctrine can be understood as "a kind of 'carve out' from *Chevron* deference"); Kunhardt & O'Connell, *supra* note 33.
[35] 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting).
[36] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 229 (1994).
[37] *West Virginia v. EPA*, 142 S. Ct. at 2633–34 (Kagan, J., dissenting).
[38] *Id.* at 2609 (majority opinion).
[39] 512 U.S. 218, 229 (1994).

statute."[40] Six years later, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court again withheld *Chevron* deference when the Food and Drug Administration (FDA) interpreted the Food, Drug and Cosmetic Act (FDCA) as authorizing FDA regulation of tobacco products.[41] Despite *Chevron*'s premise that "ambiguity constitutes an implicit delegation from Congress," the Court determined "[i]n extraordinary cases … there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[42] Because this constituted an extraordinary case, deference was not appropriate.[43] This strand of the major questions doctrine, reflected in a few other subsequent cases,[44] is sometimes called *Chevron* step zero.[45] It operates as "a kind of 'carve out' from *Chevron* deference."[46] Because *Chevron* deference was not appropriate in these extraordinary cases, the Court would revert to traditional judicial review principles and independently resolve the question of law, without deferring to the agency's reasonable interpretations.[47]

But *Brown & Williamson Tobacco Corp.* also introduced an alternative major-questions formulation: the major questions doctrine could preclude agency action on topics of economic and political significance, unless clearly authorized by Congress. Rather than conducting a *Chevron* deference analysis, the Court determined a "common sense" consideration of "the manner in which Congress [wa]s likely to delegate a policy decision of such economic and political magnitude to an administrative agency" should guide statutory interpretations.[48] Relying on this "common

[40] *Id.* at 231–32.
[41] 529 U.S. 120, 125–26 (2000).
[42] *Id.* at 159.
[43] *Id.* at 133.
[44] *See* Gonzales v. Oregon, 546 U.S. 243, 258-59 (2006); King v. Burwell, 576 U.S. 473, 485 (2015).
[45] *See generally* KOCH, JR. & MURPHY, supra note 9, § 11:34.15.
[46] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 482 (2021); *see also Major Questions Objections*, 129 Harv. L. Rev. 2191, 2193 (2016) (note).
[47] *Id.* at 482.
[48] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

sense," courts should recognize "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[49] The Court subsequently adopted a clear statement rule for such cases in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). When an agency seeks to take action with great economic and political significance, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[50] Under this major questions strand, similarly reflected in a few other cases,[51] the issue is not merely the correct interpretation of an ambiguous statute, but whether Congress has delegated authority on the issue of economic and political significance. If Congress failed to provide a clear statement, courts should not independently resolve any statutory ambiguities because additional action from Congress is necessary.[52]

These were not the only major-questions-approaches posited. Some scholars have suggested the major questions doctrine is the nondelegation doctrine disguised as a method of statutory interpretation and the clear-statement rule effectively prohibits Congressional delegations on "major" issues.[53] Other scholars argued the major questions doctrine prevents agency self-aggrandizement.[54] The divergent opinions on the contours and purpose of the major questions doctrine shows the lack of clarity in the early cases. And, as a result, courts, agencies, and litigants lacked clear guidance on how to apply the doctrine.[55]

[49] *Id.* at 160.
[50] 573 U.S. 302, 324 (2014).
[51] *See* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. ___, 142 S. Ct. 661, 665 (2022).
[52] *See* Sunstein, *supra* note 46, at 483; *see also* Sohoni, *supra* note 2, at 264.
[53] *See* Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. 174, 177 (2022); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 445 Admin. L. Rev. 445, 463 (2016).
[54] *See* Monast, *supra* note 53, at 462–63.
[55] Richardson, *supra* note 53, at 195–06; *see also* Monast, *supra* note 53, at 464–65; Sunstein, *supra* note 26, at 193.

II. THE MAJOR QUESTIONS DOCTRINE ARTICULATED IN *WEST VIRGINIA V. EPA*

West Virginia v. EPA unequivocally recognized the major questions doctrine as a canon of statutory interpretation[56] and provided an analytical framework for major-questions cases. The decision did not, however, provide a precise standard for identifying when an agency action warrants a major-questions analysis. This Part summarizes the majority opinion in *West Virginia v. EPA* and Justice Gorsuch's concurrence.

The issue presented in *West Virginia v. EPA* was "whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act."[57] Section 111 of the Clean Air Act ("CAA") directed the EPA to identify categories of stationary sources that significantly cause or contribute to "air pollution, which may reasonably be anticipated to endanger the public health or welfare."[58] Under Section 111(b), the EPA must then promulgate a standard of performance on a pollutant-by-pollutant basis that adequately demonstrates the "best system of emission reduction" (BESR) for *new* sources.[59] Under Section 111(d), the EPA must then address emissions of the same pollutant by *existing* sources, if they are not already regulated under another CAA program.[60]

In 2015, the EPA announced two rules addressing carbon dioxide pollution: one establishing the BSER for new coal and gas plants, and the other establishing the BSER for existing coal and gas plants.[61] The latter was challenged in *West Virginia v. EPA*. The BSER for existing sources,

[56] 597 U.S. ___, 142 S. Ct. 2587 (2022); *see also* David Freeman Engstrom & John E. Priddy, West Virginia v. EPA *and the Future of the Administrative State*, STAN. LAW BLOG (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/; *see also* Kristen E. Hickman, *Thoughts on* West Virginia v. EPA, YALE J. ON REG – NOTICE & COMMENT (July 5, 2022), https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/.
[57] 142 S. Ct. at 2615–16.
[58] *Id.* at 2601 (quoting 42 U.S.C. § 7411(b)(1)(A)).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 2602.

also called the Clean Power Plan, included three building blocks: (1) practices coal plants could undertake to burn coal more efficiently; (2) generation shifting from coal to natural gas plants; and (3) generation shifting from coal and gas to wind and solar generators. The effect of the Clean Power Plan would be a "sector-wide shift in electricity production from coal to natural gas and renewable."[62] The Clean Power Plan never took effect because dozens of parties sought judicial review the same day the EPA promulgated the rule. And, after a convoluted procedural path, the Supreme Court granted certiorari.

Chief Justice Roberts, writing for the majority, held the EPA lacked authority under the Clean Air Act to adopt the Clean Power Plan as the BSER.[63] In doing so, the Court articulated the major questions standard and its justification:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent makes [the Court] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince [the Court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency must instead point to clear 'clear congressional authorization' for the power it claims.[64]

The Court first noted the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall scheme."[65] And, where the statute confers authority upon an administrative agency, an inquiry into agency action must be shaped by "whether Congress in fact meant to confer" the asserted authority.[66] A clear statement

[62] *Id.* at 2603.
[63] *Id.* at 2616.
[64] *Id.*
[65] *Id.* at 2607.
[66] *Id.* at 2608.

for agency action on major questions is then justified when the statutory scheme demonstrates an agency interpretation is "extraordinary" and "common sense as to the manner in which Congress [would have been] likely to delegate such power to the agency at issue, ma[kes] it very unlikely that Congress had done so."[67] Major questions cases are a departure from "ordinary" cases involving agency interpretations and assertions of authority.[68]

The Court therefore set out a two-step framework for judicial review of administrative agency action. First, the court must determine whether the asserted agency action presents "a major questions case."[69] If so, "the Government must … point to 'clear congressional authorization' to regulate" in the asserted manner.[70] The terms "major questions case" and "extraordinary cases" are used interchangeably in articulating step one.[71] "Extraordinary cases" are defined as "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance' of that assertion provide a reason to hesitate before concluding that Congress' meant to confer such authority."[72] The Court highlighted several factors that indicate there may be a major questions case: (1) the agency "claimed to discover in a long-extant statute an unheralded power";[73] (2) the claimed power represented a "transformative expansion in [its] regulatory authority";[74] (3) the agency relied on an ancillary, rarely used provision;[75] (4) "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency;[76] (5) the agency lacked "comparative expertise" over the policy judgments;[77] and (6) the

[67] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[68] *See id.* at 2609.
[69] *See id.* at 2610.
[70] *Id.* at 2614.
[71] *Id.* at 2609–10.
[72] *Id.* at 2608 (internal quotation marks omitted) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).
[73] *Id.* at 2610 (quoting Util. Air Grp. v. EPA, 573 U.S. 302, 324 (2014)).
[74] *Id.* (quoting *Util. Air Grp.*, 573 U.S. at 324).
[75] *Id.*
[76] *Id.*
[77] *Id.* at 2612.

proposed policy "has been the subject of earnest and profound debate across the country."[78] Applying these factors, the Court determined it had "a major questions case" and concluded the term "system" was not sufficient "clear congressional authorization" to regulate in the manner prescribed by the EPA Clean Power Plan.[79]

Justice Gorsuch, joined only by Justice Alito, in concurrence took a more expansive view of when a major questions case is presented. Rather than limiting the doctrine to "extraordinary cases" of agency action, Justice Gorsuch would invoke the major question doctrine, and require clear congressional authorization, for all "decisions of vast 'economic and political significance'" by administrative agencies.[80] At first this may not seem to be a significant distinction, but under Justice Gorsuch's approach, a major question case would exist when the agency resolves "a matter of great 'political significance'" *or* imposes significant economic regulations.[81] Unlike the multi-factor approach taken by the majority, Justice Gorsuch seems to suggest political *or* economic significance alone would trigger the major-questions-clear-statement rule, such that "an agency must point to clear congressional authorization."[82] This would likely encompass a broader swath of agency action. Justice Gorsuch recognizes as much by explaining the major question doctrine "took on a special importance" due to the "explosive growth of the administrative state" and seeks to prevent agencies from "churn[ing] out new laws more or less at whim."[83]

Although *West Virginia v. EPA* defined the overarching standard for major questions cases, the list of factors provided by the majority and the divergent approach advocated by Justice Gorsuch left open a significant question: What qualifies as a major-questions case?

[78] *Id.* at 2614.
[79] *Id.* at 2610, 2614.
[80] *Id.* at 2626 (Gorsuch, J., concurring).
[81] *Id.* at 2620 (quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022)).
[82] *Id.*
[83] *Id.* at 2618.

III. A JUDICIALLY ADMINISTRABLE TEST FOR IDENTIFYING MAJOR QUESTIONS CASES

Step one of the newly adopted major-questions inquiry requires a court to determine whether agency action presents an "extraordinary case[]."[84] But, as Justice Kagan emphasized in dissent, how court should conduct this inquiry remains unclear: a reviewing court must somehow "decide[] by looking at some panoply of factors."[85] Scholars similarly viewed the Court's guidance on how to decipher when agency action presents a major question insufficient.[86] Despite the "mushy" standard,[87] a judicially administrable test can be identified in *West Virginia v. EPA* and supported by major-questions precedent. This Part will first identify and reject incorrect or unwieldy approaches arising in the courts of appeals. It will then argue that the approach is hiding in plain sight in *West Virginia v. EPA.*

A. Erroneous Approaches to Identifying Major Question Cases

Courts of appeals have attempted to apply the major questions test articulated in *West Virginia v. EPA*, but the approaches lack a judicially-administrable standard or reflect an incorrect understanding of the major questions doctrine.

The Fifth Circuit has adopted two conflicting and incorrect approaches to identifying major question cases post-*West Virginia v. EPA*. First, in *Midship Pipeline Company, L.L.C. v. FERC*, 45 F.4th 867 (5th Cir. 2022), the Fifth Circuit relied on *West Virginia v. EPA* to hold the Natural Gas Act did not authorize FERC to determine reasonable costs of remediation for natural gas pipelines constructed on privately held land.[88] But the court did not conduct step-one of the major questions analysis. Instead, the decision rested on the overarching principle that "[a]gencies have

[84] *Id.* at 2609–10.
[85] *Id.* at 2634 (Kagan, J., dissenting).
[86] *See* Hickman, *supra* note 56 (describing the standard articulated as "mushy .. rather than a bright line rule"); Strict Scrutiny, *Just how bad is the Supreme Court's EPA decision?* (June 30, 2022), https://crooked.com/podcast/just-how-bad-is-the-supreme-courts-epa-decision/ (describing the decision as based on "vibes" about agencies).
[87] Hickman, *supra* note 56.
[88] *Id.* at 876-77.

only those powers given to them by Congress."[89] Based on this premise, the Fifth Circuit conducted a statutory interpretation and determined the Natural Gas Act did not authorize the power asserted by FERC.[90] The court did not consider any of the factors discussed in *West Virginia v. EPA*, including whether FERC's action implicated an issue of economic or political significance This approach conflicts with *West Virginia v. EPA* and the major questions doctrine because it disregards the emphasis placed on "extraordinary cases."[91] By failing to first determine whether the asserted agency action even presented an extraordinary case, the Fifth Circuit erroneously expanded the major questions doctrine from extraordinary cases to all agency actions.

In *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022), the Fifth Circuit took a different approach by erroneously conflating the major questions doctrine and *Chevron*'s step-two.[92] There, the Fifth Circuit held DACA would fail step two of *Chevron* because DHS had unreasonably interpretated the INA.[93] The interpretation was unreasonable because DACA "implicates questions of deep economic and political significance" and there was "no 'clear congressional authorization' for the power that DHS claim[ed]."[94] While in prior cases the Court has blurred the line between the major questions doctrine and *Chevron* deference,[95] *West Virginia v. EPA* disentangled the major questions doctrine and *Chevron* analysis. In almost all prior major questions cases, the Court has used *Chevron* as the starting point for reviewing the administrative agency's statutory interpretations.[96] But *Chevron* was not cited or referenced at all by the majority opinion in *West*

[89] *Id. (*quoting *West Virginia v. EPA*, 142 S. Ct. at 2607).
[90] *Id.*
[91] *See West Virginia v. EPA*, 142 S. Ct. at 2609; *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[92] *See* 50 F.4th at 526–27.
[93] *Id.* at 526
[94] *Id.*
[95] *See supra* Part I.C.; *see, e.g.*, Util. Air Reg. Grp. v. EPA, 573 U.S. 302 314 (2014).
[96] *See, e.g.*, King v. Burwell, 576 U.S. 473, 485 (2015). The Court departed from this approach in just two prior cases. *see* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488–89 (2021) (conducting a statutory interpretation without discussion of *Chevron*); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S.

Virginia v. EPA. And the analytical framework applied was quite distinct. Under *Chevron*, the reviewing court begins with the text to determine whether Congress has directly spoken to the issue.[97] Under the major questions doctrine, the reviewing court begins with the agency action to determine whether it presents an "extraordinary case."[98] And, unlike the deferential treatment of implied delegations in *Chevron*,[99] the major questions doctrine "skepticism" to implied delegations and requires "clear congressional authorization."[100] By collapsing the major-questions analysis and *Chevron* step-two, the Fifth Circuit failed to appropriately analyze whether DACA presented an "extraordinary case" for the purposes of major questions analysis.

In contrast, the Eleventh Circuit applied the correct framework, but struggled to find a judicially-manageable test. In *Georgia v. President of the United States*, 48 F.4th 1283 (11th Cir. 2022), the Eleventh Circuit held the Procurement Act did not authorize agencies to insert a COVID-19 requirement into all procurement contracts and solicitations.[101] The court did not establish a clear test or relevant factors for identifying a major question but seemed to implicitly base its reasoning on three factors identified in *West Virginia v. EPA*. First, the agency claimed to discover an unheralded power to impose an "all-encompassing vaccine requirement" in the Procurement Act's "project specific restrictions."[102] Second, the claimed power represented a transformative expansion in the agency's power because the "general authority … to insert a term in every solicitation and every contract" was "worlds away" from "the sort of project-specific

____, 142 S. Ct. 661, 665–66 (2022) (same). Both of these decisions arose from the Court's emergency docket, also known as the shadow docket. As a result, the per curiam opinions lacked a comprehensive explanation of the Court's analytical approach. *See* Steve Vladeck, *Response: Emergency Relief During Emergencies*, 102 B.U. L. REV. 1787, 1788 (2022); Cashmere Cozart, *SCOTUS' Shadow Docket Coming Out of the Shadows*, UNIV. OF ILL. CHI. L. REV. (Sept. 12. 2021), https://lawreview.law.uic.edu/news-stories/scotus-shadow-docket-coming-out-of-the-shadows/.

[97] Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[98] *West Virginia v. EPA*, 142 S. Ct. at 2608.

[99] See *Chevron*, 467 U.S. at 843.

[100] *West Virginia v. EPA*, 142 S. Ct. at 2614.

[101] 48 F.4th at 1296.

[102] *See id.* at 1296.

restrictions contemplated by the [Procurement] Act."[103] And, lastly, Congress had declined to enact legislation conferring this broad authority based on other statutes that impose "a particular economic or social policy among federal contractors through the procurement process," and the absence of a statutory provision imposing an "across-the-board vaccination mandate."[104] While this Eleventh Circuit analyzed the factors identified in *West Virginia v. EPA*, the approach lacks sufficient structure for consistent judicial administration. It is vulnerable to the criticism that courts will simply choose from some unclear "panoply of factors"[105] or make decisions based on "vibes."[106] Thankfully, *West Virginia v. EPA* and prior cases reveal a judicially-manageable test for identifying major questions cases.

B. Identifying Major Questions Cases Using West Virginia v. EPA*'s Dual-Element Test*

i. The dual-element test

In defining "extraordinary cases," *West Virginia v. EPA* impliedly identified a two-element test to determine when a major questions case is presented. The Court defined extraordinary cases based on the "history and the breadth of the authority that [the agency] has asserted, *and* the economic and political significance of that assertion.'"[107] This definition suggests major-questions cases satisfy two distinct elements: (1) the asserted authority is novel and extensive based on the "history and breadth of the authority that the agency has asserted" *and* (2) the asserted authority implicates issues of "economic and political significance."[108] The factors identified by the majority and prior major questions doctrine cases reveal how each element can be satisfied.

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[103] *See id.*
[104] *See id.* at 1297.
[105] *See West Virginia v. EPA*, 142 S. Ct. at 2634 (Kagan, J., dissenting).
[106] *See* Strict Scrutiny, *supra* note 86.
[107] *West Virginia v. EPA*, 142 S. Ct. at 2608 (emphasis added) (internal quotation marks omitted) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
[108] *Id.*

Four factors identified in *West Virginia v. EPA* address whether an agency's action is novel and extensive in light of the history and breadth of the agency's authority: (1) the discovery of an unheralded power in a long-extant statute; (2) the power is a transformative expansion in the agency's regulatory authority; (3) the power is found in an ancillary provision; and (4) the agency lacks comparative expertise over the asserted power. Prior major-questions cases confirm that these factors are evidence of novel or extensive agency action.

An agency's discovery of an unheralded power in a long-extant statute demonstrates novelty because it is a departure from the agency's prior "established practice" and shows a historic "want of assertion of power."[109] In *West Virginia v. EPA*, the EPA "had never devised a cap by looking to a [generation-shifting] system," which indicated the current assertion of authority was a newfound power.[110] Framed differently: the absence of precedent for the asserted authority indicates it is novel.[111] For instance, in *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. ___, 141 S. Ct. 2485 (2021), the agency's claim of authority was "unprecedented" because no prior regulation under the provision, which was enacted in 1944, approached a similar "size or scope."[112]

A "transformative expansion in [the agency's] regulatory authority"[113] reflects both novelty and an extensive increase in authority. This factor can be shown by a "fundamental revision of the statute" [114] to enable regulation in a new area or industry.[115] The first major questions case, *MCI Telecommunications Corp.*, explains a "fundamental change" "depends to some extent on the

[109] *See id.* at 2610 (quoting FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941)).
[110] *Id.*
[111] *See id.* at 2610; *see also* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S. Ct. 2485, 2489 (2021); Nat'l Fed. of Indep. Bus. v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 666 (2022).
[112] 141 S.Ct. at 2489.
[113] *West Virginia v. EPA*, 142 S. Ct. at 2610.
[114] *Id.* at 2611 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).
[115] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000).

importance of the item changed to the whole."[116] When an agency action revises a provision with "enormous importance" to the statutory scheme or "'central' to administration" of the statute, it introduces a "new regime of regulation" that "is not the one that Congress established."[117] By changing the regulatory regime, the agency is asserting regulatory authority over a new area or sector.[118] In *West Virginia v. EPA*, this "fundamental revision" was evidenced by transitioning from regulating the performance of individual sources to regulating the emissions of a sector as a whole.[119]

When the newfound power is located in an "ancillary" or rarely-used provision of the Act,[120] it supports a finding of novelty. The provision relied on by the EPA in *West Virginia v. EPA* was characterized as the "backwater" of the Section because it had been used "only a handful of times" and was "designed to function as a gap filler."[121] In the past, the Court has also found ancillary provisions to contain "express limitation[s]" or address other agency's roles in the regulatory scheme.[122] For instance, in *Gonzalez v. Oregon*, 546 U.S. 243 (2006), a provision authorizing the Attorney General to deny, suspend, or revoke physician's registrations was an express limitation that did not authorize medical judgments because those judgments were delegated to the Secretary of Health and Human Services.[123] Relying on an ancillary provision suggests the action is novel or broad because it introduces a new basis for action and may encroach on another agency.

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[116] *MCI Telecomms. Corp.*, 512 U.S. at 229.
[117] *Id.* at 234.
[118] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 146 (tobacco); Gonzalez v. Oregon, 546 U.S. 243, 261 (2006) (criminalization of medical professionals); Nat'l Federation of Indep. Business v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 665 (2022) (hazards of daily life); Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488 (2021) (downstream connections to the spread of disease).
[119] *Id.*
[120] *West Virginia v. EPA*, 142 S. Ct. at 2610 (quoting Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001)).
[121] *Id.* at 2602, 2610, 2613.
[122] *See Gonzalez*, 546 U.S. at 266–67.
[123] *Id.*

When the agency lacks "comparative expertise" over the asserted policy judgments,[124] the proposed action may be novel and extensive. Generally, "Congress intend[s] to invest interpretive power in the administrative actor in the best position" to exercise such judgment.[125] Where the agency lacks expertise or experience, they are impliedly acting outside their area of knowledge and diverging from their historical practices. In *West Virginia v. EPA*, EPA lacked the necessary "technical and policy expertise" "in areas such as electricity transmission, distribution, and storage."[126] The Court has also relied on an absence of expertise in prior major-questions cases when the Attorney General sought to make medical judgments[127] and the IRS sought to craft health care policy.[128]

West Virginia v. EPA and major-questions precedent also explain how the second element, economic and political significance, can be satisfied. Although the conjunction "and" suggests both economic and political significance is necessary, past cases point to the opposite conclusion.[129] Either economic or political significance is sufficient to satisfy the second element. First, an agency action presents issues of economic significance when it regulates a significant portion of a major American industry;[130] requires billions of dollars in private spending or administrative costs;[131] and/or affects the economic decisions of millions of Americans.[132] In *West*

[124] *West Virginia v. EPA*, 142 S. Ct. at 2613.
[125] *See Gonzalez*, 546 U.S. at 266.
[126] *West Virginia v. EPA*, 142 S. Ct. at 2612.
[127] *Gonzalez*, 546 U.S. at 267.
[128] King v. Burwell, 576 U.S. 473, 486 (2015).
[129] *See, e.g.*, *Gonzalez*, 546 U.S. at 267–68 (addressing only political significance); *Util. Air Reg. Grp.*, 573 U.S. at 322–24 (addressing only economic significance).
[130] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) (agency action would effect 40% of a major sector of the telecommunications industry); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (regulation would apply to an industry constating a significant portion of the American economy); *Util. Air Reg. Grp.*, 573 U.S. at 324.
[131] *See Util. Air Reg. Grp.*, 573 U.S. at 324 (regulations would impose $21 billion in administrative costs and $147 billion in permitting costs); *see also King*, 576 U.S. at 485; Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021).
[132] *See King*, 576 U.S. at 485.

Virginia v. EPA, the Clean Power Plan had economic significance because it would assert "unprecedented power of American industry" and would "entail billions of dollars in compliance costs," which would then affect energy prices for Americans.[133] And, in *King v. Burwell*, 576 U.S. 473 (2015), a regulation that would affect the price of health insurance for millions of people had sufficient economic significance.[134]

Second, political significance can be shown by Congressional action or inaction regarding the specific program, prominent debate surrounding the issue, and/or tension with state law or authority. First, *West Virginia v. EPA*, and past decisions, have placed significant emphasis on whether "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency[135] because the presence of debate or contrary legislation in Congress indicates the "importance of the issue."[136] Second, the issue is politically significant when it has been the "subject of earnest and profound debate across the country"[137] because "political and moral debate" surrounding an issue demonstrates its importance to the public.[138] Third, political significance is shown when the agency action intrudes on a particular domain of state law.[139] In *Alabama Association of Realtors*, the Court identified intrusion on a "particular domain of state law" as a significant non-financial issue because it would "alter the balance between federal and state power."[140]

[133] *West Virginia v. EPA*, 142 S. Ct. at 2604, 2612.
[134] 576 U.S. at 485.
[135] *West Virginia v. EPA*, 142 S. Ct. at 2610; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60; *Gonzalez*, 546 U.S. at 267–68; *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2486–87.
[136] *See West Virginia v. EPA*, 142 S. Ct. at 2614.
[137] *Id.*; *see also Gonzalez*, 546 U.S. at 267–68.
[138] *Gonzalez*, 546 U.S. at 249, 267.
[139] *Ala. Ass'n. of Realtors,* 141 S. Ct. at 2489.
[140] *Id.*

ii. The legal and logical case for the dual-element test

The test requires a sufficient demonstration that the agency action (1) is novel and extensive based on the history and breadth of authority *and* (2) implicates issues of economic and political significance. Requiring a major-questions case to satisfy both elements aligns with precedent; serves the "common sense" justification of the major questions doctrine; and provides an objective approach which enables consistent judicial administration.

Although the test was not formulated until West Virginia v. EPA, every prior major-questions case has satisfied both elements. For the past thirty-years, the Court has only conducted major-questions analysis when the cases involves both a novel or extensive agency action *and* political or economic significance.[141] Although the exact phrasing of the elements and supporting factors varies, the common threads are clear. And, in formulating each factor, *West Virginia v. EPA* heavily relied on and interpreted the prior cases.[142] This also undermines the approach advocated by Justice Gorsuch. In no case is political *or* economic significance *alone* sufficient to render the case "extraordinary."[143]

The dual-element test ensures the major questions doctrine is only applied in "extraordinary cases" where common sense warrants skepticism of whether Congress delegated authority. An indeterminate and unclear standard could encompass ordinary cases of agency action. If the major

[141] *See, e.g., MCI Telecomms. Corp.*, 512 U.S. 218, 231 (1994) (explaining agency action constituted "fundamental revision" and affected 40% of a major sector of the industry); *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146, 159–60 (2000) (explaining agency action constituted an expansion into the tobacco industry, discovered a new power in a statute, regulated an industry constituting a significant portion of American economy, and Congress had declined to enact such a scheme); *Gonzalez*, 546 U.S. 243, 249, 260–61, 266–67 (2006) (explaining agency action constituted a transformation of the limits placed on the Attorney General to allow regulation in a new area, was outside the expertise of the Attorney General, relied on an ancillary provision, had been the subject of earnest and profound debate, and intruded on state law); *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2488 (explaining agency action constituted a transformative expansion in authority, asserted a unprecedented power, had significant economic impact, and intruded on state law).
[142] *See West Virginia v. EPA*, 142 S. Ct. at 2608–2614.
[143] *See id.* at 2618–26 (Gorsuch, J., concurring).

doctrine required "clear congressional authorization" for mundane and traditional exercises of administrative agency power, it could interfere with the separation of powers by restricting Congress' ability to legislative freely, including authorizing administrative agencies to fill in the gaps of legislation. But a novel or broad assertion of authority is coupled with an issue of significant political or economic importance creates skepticism because it prevents executive branch aggrandizement absent clear congressional authorization. By limiting the major questions doctrine to "extraordinary cases," administrative agencies are cabined within their legislative authority, but courts are not overreaching.

Judicial administration is also bolstered by the test because it relies on objective factors and introduces a clear threshold requirement. A major questions case cannot be demonstrated by a mere showing of some indeterminate degree of political or economic significance. Rather, the agency action must reflect a departure from ordinary agency practice under the first element. And the political and economic implications are not theoretical "vibes," but grounded in an objective showing of political debate, conflicts with state law, or extensive private or public costs.

This test has already been applied, admittedly without extensive analysis or reasoning, in the D.C. Circuit. *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), held a rule requiring New England fisheries to fund at-sea monitoring programs promulgated by the National Marine Fisheries Service pursuant to its authority to establish "fishery management plans" under the Magnuson-Stevens Fishery Conservation and Management Act did not constitute a major questions case.[144] Judge Rogers, joined by Chief Judge Srinivasan, determined the major

[144] 45 F.4th 359, 363–64 (D.C. Cir. 2022). After this paper was drafted, the Supreme Court granted certiorari in *Loper Bright Enterprises, Inc. v. Raimondo* to address "whether the court should overrule *Chevron*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." *See* Loper Bright Enters. v, Raimondo, No. 22-451 (cert. granted May 1, 2023).

questions doctrine "applies *only*" when the "history and breadth of the authority that [the agency] has asserted *and* the economic and political significance of the assertion" demonstrate an "extraordinary case[]."[145] The monitoring program failed to meet this standard because the National Marine Fisheries Service had "expertise and experience within [the] specific industry" and the agency did not claim "broader power to regulate the national economy."[146] Also, while the Eleventh Circuit did not rely on the two-element framework in *Georgia v. President of the United States*, the court's decision did rely on a showing of both novel or extensive action *and* issues of political or economic significance.[147] These early cases forecast judicial administration may be possible based on the dual-element requirement and objective factors derived from *West Virginia v. EPA*.

CONCLUSION

Admittedly, one aspect of this test remains unclear. Due to varying approaches across cases, it is unclear how many factors are necessary to demonstrate each element. For instance, could a lack of expertise alone demonstrate an agency action was novel and extensive? While in almost all cases multiple factors demonstrated a departure from ordinary agency action, in *King v. Burwell*, the IRS' lack of expertise in health care policy alone seemed sufficient.[148] This question will need to be answered, but the dual-element test set out in *West Virginia v. EPA* creates the beginnings of a judicially administrable standard for identifying major questions cases.

[145] *Id.* at 364 (emphasis added) (internal quotation marks omitted) (quoting *West Virginia*, 142 S. Ct. at 2595).
[146] *Id.*
[147] Georgia v. President of the United States, 48 F.4th 1283, 1296 (11th Cir. 2022).
[148] King v. Burwell, 576 U.S. 473, 485 (2015)

Applicant Details

First Name	**Daniel**
Middle Initial	**J**
Last Name	**Damitio**
Citizenship Status	**U. S. Citizen**
Email Address	**daniel.damitio@law.northwestern.edu**
Address	**Address** Street **860 N DEWITT PL, Apt 2002** City **Chicago** State/Territory **Illinois** Zip **60611** Country **United States**
Contact Phone Number	**4254920019**

Applicant Education

BA/BS From	**University of Washington**
Date of BA/BS	**June 2020**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 12, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Northwestern University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Chicago Bar Association Moot Court Competition - 2021** **Northwestern Law Julius Miner Moot Court Competition - 2022** **National Moot Court Competition in Child Welfare & Adoption Law - 2021**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Maskay, Nishchay
maskayn@sec.gov
(202) 551-8513
Clopton, Zachary
zclopton@law.northwestern.edu
(312) 503-5063
DiCola, Peter
p-dicola@law.northwestern.edu
(312) 503-3231

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Daniel Damitio
860 N DeWitt Pl.
Chicago, Illinois 60611
425-492-0019
daniel.damitio@law.northwestern.edu

June 11, 2023

The Honorable Tanya S. Chutkan
U.S. District Court, District of Columbia
333 Constitution Avenue N.W.
Washington, District of Columbia 20001

Dear Judge Chutkan:

Enclosed please find an application for a clerkship in your chambers for the 2024-25 term. I am a recent graduate of the Northwestern Pritzker School of Law and an incoming first-year associate at Covington & Burling. Since beginning law school, my career goals have always centered around diversity of experiences. I believe that the best lawyers develop by facing unfamiliar challenges and pursuing new objectives. Even in law school, I have tried to experience the law from different perspectives. My first summer, I interned with the Securities and Exchange Commission Division of Enforcement. My second summer, I worked with the antitrust and white collar groups at Covington & Burling. My third year, I helped represent a habeas petitioner in the Third Circuit through the Federal Appellate Clinic.

As I looked through your career achievements and experiences, it seemed as though you shared this value. As a former public defender and a complex civil litigator, you have a unique perspective among the federal judiciary. This perspective, emphasizing both profound justice and technical mastery, is what specifically drew me to apply to your chambers.

My application includes a resume, transcript, and writing sample. Letters of recommendation from the following individuals have been added by the Law School:

Nishchay Maskay, Counsel, SEC Division of Enforcement
maskayn@sec.gov; (202) 551-8513

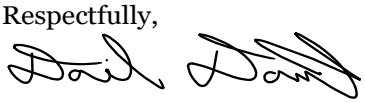
Professor Peter DiCola, Northwestern Pritzker School of Law
p-dicola@law.northwestern.edu; (312) 503-1570

Professor Zachary Clopton, Northwestern Pritzker School of Law
zclopton@law.northwestern.edu; (312) 503-5063

In addition, the Law School's clerkship director, Professor Janet Brown, is available to answer your questions. You may reach her at jbrown@law.northwestern.edu or 312-503-0397.

I would welcome the opportunity to further discuss my qualifications for the position. Thank you for your consideration.

Respectfully,



Daniel Damitio

DANIEL J. DAMITIO
860 N DeWitt Pl., Apt. #2002 Chicago, IL 60611 • daniel.damitio@law.northwestern.edu • (425) 492-0019

EDUCATION

Northwestern University Pritzker School of Law, Chicago, IL
Juris Doctor, May 2023

- Final GPA: 4.15
- Kirkland & Ellis Scholar in Criminal Law (award for the highest section grade in a 1L doctrinal course)
- NORTHWESTERN UNIVERSITY LAW REVIEW – Online Articles Editor
- Recipient of 2023 Association of Securities and Exchange Commission Alumni (ASECA) Scholarship (award for demonstrating excellence in the field of securities law and interest in employment at the SEC)
- 2023 Julius H. Miner Moot Court Board – Co-Chair
- 2022 Julius H. Miner Moot Court Competition – Lowden-Wigmore Prize (for reaching the final round) and International Academy of Trial Lawyers Award (for Outstanding Speaker in the final round)
- Federal Bar Association – 2022 Co-President
- Moot Court Society – 2022 Treasurer

University of Washington, Seattle, WA
Bachelor of Arts in Business Administration – Accounting; Minor – History, June 2020

- GPA: 3.87; *Magna Cum Laude*
- Recipient of Boeing Writing Scholarship (award based on nonfiction short essay submission)
- 2020 Foster School of Business Capstone Case Competition Finalist

Publications

- Daniel Damitio, *Auditing Overseas: How the United States Can Learn from Recent Financial Audit Reform in the United Kingdom*, NORTHWESTERN UNIVERSITY LAW REVIEW (forthcoming 2023)

EXPERIENCE

Northwestern Pritzker School of Law, Chicago, IL
Federal Appellate Clinic Student, August 2022 – May 2023

- Drafted and filed opening brief for client's habeas appeal in the Third Circuit

Northwestern Pritzker School of Law, Chicago, IL
Research Assistant to Professor Alex Lee, June 2022 – February 2023

- Conducted case law research in the areas of administrative and securities law

Covington & Burling LLP, Washington, D.C.
Summer Associate, May 2022 – July 2022

- Researched and wrote memos on legal questions for the antitrust, securities, and litigation practice groups

Securities and Exchange Commission, Division of Enforcement, Washington, D.C.
Student Honors Intern, May 2021 – July 2021

- Assisted investigative team by comparing Analyst Reports and SEC filings (e.g., 10-Ks, 10-Qs, & 8-Ks) with internal corporate communications to gather evidence of security violations

UW Foster School of Business, Department of Accounting, Seattle, WA
Financial and Managerial Accounting Teaching Assistant, September 2019 – June 2020

- Instructed semiweekly review sessions for two sections of forty students each

UW Foster School of Business, Department of Accounting, Seattle, WA
Undergraduate Research Assistant for Professor Philip Quinn, September 2018 – June 2019

- Researched the materiality standard in the securities law context and the SEC enforcement process for *Undisclosed SEC Investigations*, MGMT. SCI.

ADDITIONAL INFORMATION

Interests: Barbecue Cooking, Road Cycling, Tennis

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: **Damitio,Daniel**
Student ID: **3296334**

Law Unofficial Transcript

Print Date: 2023-06-06
Staff Member, NU Law Review (2021-22)
Online Articles Editor, NU Law Review (2022-23)

Academic Program History

Program: **Juris Doctor**
07/30/2020: **Active in Program**

Beginning of Law Record

2020 Fall (08/24/2020 - 12/17/2020)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 510	Contracts	3.000	3.000	A+	12.990
Course Attributes:	1L required course (not CLR) Evaluated non-enrollment section in Blue First Year Students only Registrar enrollment; not a biddable class Business/Corporate transactions an element Contracts Practice Area an element of course Synchronous:Class meets remotely at scheduled time				
Instructor:	James Lupo				
CRIM 520	Criminal Law	3.000	3.000	A	12.000
Course Attributes:	1L required course (not CLR) Evaluated non-enrollment section in Blue First Year Students only Registrar enrollment; not a biddable class Criminal Law and Procedure Practice Area				
Instructor:	Meredith Rountree				
LAWSTUDY 540	Communication& Legal Reasoning	2.000	2.000	A	8.000
Course Attributes:	1L CLR Course First Year Students only Registrar enrollment; not a biddable class Synchronous:Class meets remotely at scheduled time				
Instructor:	Michael Zuckerman				
LITARB 530	Civil Procedure	3.000	3.000	A+	12.990
Course Attributes:	1L required course (not CLR) Evaluated non-enrollment section in Blue First Year Students only Registrar enrollment; not a biddable class Synchronous:Class meets remotely at scheduled time Civil Litigation & Dispute Resolution Procedure Practice Area present in course Synchronous:Class meets remotely at scheduled time				
Instructor:	Zachary Clopton				
PPTYTORT 530	Property	3.000	3.000	A+	12.990
Course Attributes:	1L required course (not CLR) Evaluated non-enrollment section in Blue First Year Students only Registrar enrollment; not a biddable class Intellectual Property Practice Area present Property Practice Area present in course Synchronous:Class meets remotely at scheduled time				
Instructor:	Peter DiCola				

			Attempted	Earned	GPA Units	Points
Term GPA	4.212	Term Totals	14.000	14.000	14.000	58.970
Cum GPA	4.212	Cum Totals	14.000	14.000	14.000	58.970

Term Honor: Dean's List

2021 Spring (01/11/2021 - 05/06/2021)

Course	Description	Attempted	Earned	Grade	Points
CONPUB 500	Constitutional Law	3.000	3.000	A+	12.990
Course Attributes:	1L required course (not CLR) First Year Students only Registrar enrollment; not a biddable class Constitutional Law or Procedure an element Synchronous:Class meets remotely at scheduled time				
Instructor:	Andrew M Koppelman				
CONPUB 610	First Amendment	3.000	3.000	A+	12.990
Course Attributes:	Evaluated primarily by exam Recommended elective for JD students Open to First Year Students Constitutional Law or Procedure an element Tort & Personal Injury Law Synchronous:Class meets remotely at scheduled time				
Instructor:	Jason DeSanto				
LAWSTUDY 541	Communication& Legal Reasoning	2.000	2.000	A	8.000
Course Attributes:	1L CLR Course First Year Students only Registrar enrollment; not a biddable class Synchronous:Class meets remotely at scheduled time				
Instructor:	Michael Zuckerman				
LAWSTUDY 631L	Economic Analysis of Law	3.000	3.000	A+	12.990
Course Attributes:	Evaluated primarily by exam Counts toward Business Enterprise Concentration Open to First Year Students Meets Perspective Elective degree requirement Law and Social Science present in course Hybrid: Remote component and in-person mtgs				
Instructor:	Ezra Friedman				
PPTYTORT 550	Torts	3.000	3.000	A	12.000
Course Attributes:	1L required course (not CLR) Evaluated primarily by exam First Year Students only Registrar enrollment; not a biddable class Tort & Personal Injury Law Synchronous:Class meets remotely at scheduled time				
Instructor:	Emily Kadens				

			Attempted	Earned	GPA Units	Points
Term GPA	4.212	Term Totals	14.000	14.000	14.000	58.970
Cum GPA	4.212	Cum Totals	28.000	28.000	28.000	117.940

Term Honor: Dean's List

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: **Damitio,Daniel**
Student ID: **3296334**

Law Unofficial Transcript

2021 Fall (08/30/2021 - 12/16/2021)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 650	Antitrust Law	3.000	3.000	A+	12.990
Course Attributes:	Evaluated primarily by exam Counts toward Business Enterprise Concentration Antitrust Practice Area an element of this course Business/Corporate transactions an element				
Instructor:	John McGinnis				
CONPUB 650	Federal Jurisdiction	3.000	3.000	A-	11.010
Course Attributes:	Evaluated primarily by exam Appellate Law Concentration Recommended elective for JD students Constitutional Law or Procedure an element Civil Litigation & Dispute Resolution Procedure Practice Area present in course				
Instructor:	James Pfander				
LAWSTUDY 500	Independent Study	3.000	3.000	A+	12.990
Course Attributes:	Registrar enrollment; not a biddable class Students must receive prof permission to enroll Satisfies Research Writing degree req				
Instructor:	Peter DiCola				
LITARB 635	Evidence	3.000	3.000	A-	11.010
Course Attributes:	Evaluated primarily by exam Appellate Law Concentration Recommended elective for JD students Civil Litigation & Dispute Resolution				
Instructor:	Ronald Allen				
LITARB 686	Contemp Prob in Complex Lit	2.000	2.000	A	8.000
Course Attributes:	Counts toward Civil Litigation & Dispute Res Conc Civil Litigation & Dispute Resolution				
Instructor:	Adam Hoeflich				

		Attempted	Earned	GPA Units	Points
Term GPA	4.000 Term Totals	14.000	14.000	14.000	56.000
Cum GPA	4.141 Cum Totals	42.000	42.000	42.000	173.940

Term Honor: Dean's List

2022 Spring (01/10/2022 - 05/05/2022)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 601S	Business Associations	3.000	3.000	A	12.000
Course Attributes:	Evaluated primarily by exam Counts toward Business Enterprise Concentration Recommended elective for JD students Open to First Year Students Business/Corporate transactions an element Commercial and Bankruptcy Law Practice Area				
Instructor:	Katherine Litvak				
CONPUB 600	Administrative Law	3.000	3.000	A	12.000
Course Attributes:	Evaluated primarily by exam Appellate Law Concentration Required for Environmental Law Concentration Recommended elective for JD students Constitutional Law				
Instructor:	Yoon-Ho Lee				
CONPUB 669	Contemporary Supreme Ct	2.000	2.000	A	8.000
Course Attributes:	Appellate Law Concentration Constitutional Law				
Instructor:	Tonja Jacobi				
LITARB 601	Legal Ethics & Prof'l Resp	3.000	3.000	A+	12.990
Course Attributes:	Meets Legal Ethics degree requirement				
Instructor:	Wendy Muchman				
LITARB 650	Civil Procedure II	3.000	3.000	A	12.000
Course Attributes:	Evaluated primarily by exam Appellate Law Concentration Recommended elective for JD students Open to First Year Students Civil Litigation & Dispute Resolution Procedure Practice Area present in course				
Instructor:	Zachary Clopton				

		Attempted	Earned	GPA Units	Points
Term GPA	4.071 Term Totals	14.000	14.000	14.000	56.990
Cum GPA	4.124 Cum Totals	56.000	56.000	56.000	230.930

Term Honor: Dean's List

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: **Damitio,Daniel**
Student ID: **3296334**

Law Unofficial Transcript

2022 Fall (08/29/2022 - 12/15/2022)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 620	Securities Regulation	4.000	4.000	A+	17.320
Course Attributes:	Evaluated primarily by exam Counts toward Business Enterprise Concentration Business/Corporate transactions an element				
Instructor:	Allan Horwich				
BUSCOM 649	Accounting for Decision-Making	2.500	2.500	A	10.000
Course Attributes:	Counts toward Business Enterprise Concentration Open to Tax LLMs Class dates follow University Quarter Schedule Business/Corporate transactions an element Commercial and Bankruptcy Law Practice Area				
Instructor:	Swaminathan Sridharan				
LAWSTUDY 642	Narrative Structures	3.000	3.000	A+	12.990
Course Attributes:	Evaluated primarily by exam Open to First Year Students				
Instructor:	Steven Lubet				
LITARB 626	Dispute Resolution in Sports	2.000	2.000	A+	8.660
Course Attributes:	First Class Attendance Required Satisfies Prof Writing degree req Civil Litigation & Dispute Resolution				
Instructor:	Daniel Gandert				
LITARB 719	Clinic: Federal Appellate Prac	4.000	4.000	A	16.000
Course Attributes:	Courses in the Law School's Legal Clinic Third year students only Appellate Law Concentration Satisfies Experiential Learning degree req Counts toward Law and Social Policy Concentration Satisfies Prof Writing degree req Criminal Law and Procedure Practice Area Civil Litigation & Dispute Resolution				
Instructor:	Xiao Wang				

		Attempted	Earned	GPA Units	Points
Term GPA	4.192 Term Totals	15.500	15.500	15.500	64.970
Cum GPA	4.138 Cum Totals	71.500	71.500	71.500	295.900

Term Honor: Dean's List

2023 Spring (01/09/2023 - 05/04/2023)

Course	Description	Attempted	Earned	Grade	Points
BUSCOM 599	Internal Corporate Investigati	2.000	2.000	A	8.000
Instructor:	Paul Tzur Jordan Matthews				
BUSCOM 624	Sec.Reg:Enforc & Liability	3.000	3.000	A+	12.990
Course Attributes:	Evaluated primarily by exam Counts toward Business Enterprise Concentration Offered every other year Business/Corporate transactions an element Civil Litigation & Dispute Resolution Procedure Practice Area present in course				
Instructor:	Allan Horwich				
BUSCOM 690	Basic Federal Income Taxation	3.000	3.000	A+	12.990
Course Attributes:	Evaluated primarily by exam Counts toward Business Enterprise Concentration Recommended elective for JD students Counts toward Law and Social Policy Concentration Open to First Year Students Business/Corporate transactions an element Family Law Practice Area in course Taxation Practice Area present in course				
Instructor:	Genevieve Tokic				
CONPUB 608	Telecommunications	2.000	2.000	A+	8.660
Course Attributes:	Constitutional Law or Procedure an element Law and Social Science present in course Public Interest				
Instructor:	James Speta				
LITARB 719	Clinic: Federal Appellate Prac	4.000	4.000	A	16.000
Course Attributes:	Courses in the Law School's Legal Clinic Third year students only Appellate Law Concentration Satisfies Experiential Learning degree req Counts toward Law and Social Policy Concentration Satisfies Prof Writing degree req Criminal Law and Procedure Practice Area Civil Litigation & Dispute Resolution				
Instructor:	Xiao Wang				

		Attempted	Earned	GPA Units	Points
Term GPA	4.189 Term Totals	14.000	14.000	14.000	58.640
Cum GPA	4.147 Cum Totals	85.500	85.500	85.500	354.540
Law Career Totals					
Cum GPA	4.147 Cum Totals	85.500	85.500	85.500	354.540

End of Law Unofficial Transcript

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
ENFORCEMENT

June 8, 2022

Re: Recommendation Letter for Daniel Damitio

To Whom It May Concern:

I am writing to express my strong support for the clerkship application of Daniel Damitio. I worked closely with Danny during his Summer 2021 internship with the Securities and Exchange Commission's Division of Enforcement. Danny is among the strongest interns I have worked with, and I am confident that he would be an excellent judicial clerk (and that he would have been a fantastic co-clerk during my federal appellate and district court clerkships).

Danny first impressed me during his interview, when we discussed his prior research regarding the stock trading of executives who had been notified that they were facing SEC charges. Danny was able to confidently and coherently talk about nuanced aspects of the SEC's charging processes, before he even started working with us. I was thrilled when he accepted our offer to join us.

Once Danny arrived, we immediately asked him to jump into a complex securities fraud investigation, for which he helped us sort out the factual record and assess whether a company and its executives had misled investors. He quickly immersed himself in the investigation, asking discerning questions and integrating disparate sources of information to help develop and test investigative theories. Danny's legal research and analysis were excellent, and he quickly mastered the relevant precedent and regulations. Danny is a superb writer; his writing was clear and succinct, and reflected thorough and thoughtful analysis of legal and factual questions.

Danny was also an excellent team member, and was always happy to pitch in when we needed help. He skillfully juggled multiple projects relating to different investigations, working efficiently and easily meeting deadlines. We could trust him to work independently and effectively, with minimal oversight given our remote work environment. He was an enthusiastic intern, regularly seeking opportunities to expand his horizons and gain new experiences. I have no doubt that you will be able to rely on Danny to prepare thoughtful, timely, and well-written work product, and that you and your staff will enjoy having him as a colleague.

Please feel free to contact me at (202) 551-8513 or maskayn@sec.gov if you have any questions.

Sincerely,

/s/ Nishchay H. Maskay

Nishchay H. Maskay

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 12, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am writing to you to recommend Daniel (Danny) Damitio for a clerkship in your chambers. Danny is a stellar student and he will make an excellent law clerk.

I taught Danny in two courses at Northwestern: Civil Procedure I and II. He performed extremely well in both.

I first taught Danny in Civil Procedure I, during his first semester at Northwestern. Danny was a strong participant in class, answering even my most difficult questions. The course is graded primarily based on a four-hour, in-class final exam. Danny's exam was superb, earning him an A+. He had among the highest scores on each of the two essay questions and the multiple-choice section. His essay answers displayed a strong grasp of the material and a clear and concise writing style, despite the tight time constraints. I have no doubt Danny will continue to excel at legal writing, even under time pressure.

I taught Danny again in Civil Procedure II, an advanced elective course covering topics such as subject-matter jurisdiction, complex litigation, preclusion, and due process. Danny again made strong contributions in class, and again wrote an extremely strong exam, this time earning a straight A. His answers on the two more doctrinal questions were especially strong. He navigated complicated fact patterns, offering clear statements of the applicable legal rules and nuanced analysis of how they applied to the facts. Again, the writing was very good and the legal analysis was spot on.

Danny's performance in my courses is consistent with his overall record at Northwestern—in a word, fantastic. He clearly has impressed many of my colleagues. Danny achieved his strong grades while also participating in a range of extracurricular activities. He was selected as an editor on the law review; he was a finalist in moot court; and he served in leadership roles in multiple student organizations.

Danny is very eager to clerk. He recognizes that a clerkship will be valuable training as he prepares for a career as a lawyer. More specifically, Danny mentioned two aspects of clerking that are particularly attractive to him. First, he is eager to serve the public, and he (rightly) sees clerking as public service. Second, Danny likes a challenge, including an intellectual challenge, and he is looking forward to puzzling through challenging legal questions as a law clerk.

Not only will Danny enjoy clerking, but he will be good at it. As mentioned, he is already a strong writer. He also clearly picks up new material quickly and masters it. These skills are important for law clerks and lawyers, and Danny has them in spades. I recommend him strongly.

Thank you for your time and attention. Please do not hesitate to contact me any time by email at zclopton@law.northwestern.edu or on my cell phone at 858-405-5485.

Respectfully,

Zachary D. Clopton
Professor of Law
Northwestern Pritzker School of Law

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 12, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am writing to enthusiastically recommend Danny Damitio for a judicial clerkship. I taught Danny as a 1L Property student in Fall 2020 and then supervised the drafting of his student note for the Northwestern Law Review in Fall 2021. He is among the very strongest candidates for a clerkship that I have had the pleasure to teach, and not just because of his formidable intelligence. Danny is unassuming, amiable, and kind and is a pleasure to work with

Danny came to Northwestern directly from his undergraduate studies at the University of Washington, where he majored in accounting. Every student has a major, of course, but I mention it in Danny's case because the precision and the process of accounting seems to have shaped how he thinks. Seldom have I seen a student who understood how to apply his understanding of accounting, business, or finance to the study of law as well as he has. What impresses me most is that he has excelled not only in the common law courses (like my Property course, where he tied for the top score and earned an A+) and the regulatory courses, such as Antitrust. He has also aced the public law courses like Constitutional Law. In other words, he has the facility you would expect in fields that consider incentives, reasonableness standards, and making successful plaintiffs whole. But he also has a subtle understanding of legal process, rights, and balancing tests.

This outstanding ability in many facets of legal analysis came through on the biggest stage at Northwestern Law, when Danny won the outstanding speaker award in our Miner Moot Court competition. It also showed each time I spoke with him about his student note. No matter what discipline or legal field I drew from, Danny would grasp what I was saying immediately. He would be an excellent, level-headed, and trustworthy participant in discussions of whatever legal issues you face in chambers.

Danny is also a very strong writer and researcher. He won an award for nonfiction writing as an undergrad. His exam writing under time pressure is clear, cogent, and well-organized. But the best evidence of his writing ability that I can give comes from his independent study. Characteristically, Danny tackled a complicated regulatory issue for his student note: the regulation of the market for financial auditing, a market that is dominated by the big four accounting firms. I was impressed by the research Danny did, which involved a comparative study of the U.S. and U.K. approaches to financial auditing. He scoured white papers and GAO reports (and had the training in accounting to understand the material at a sophisticated level). But I was also impressed with the quality of his writing. He documented his meticulous research well. He also managed to put the complex regulatory material into the context of business history over the past two decades, making the material more accessible to a general-interest reader. Throughout the process, Danny was responsive to feedback and diligent about reporting back to me about his progress. Based on my experience, I am confident that Danny will be an effective writer of memos and draft opinions. You can count on him to work independently but respond to feedback in an upbeat and professional manner.

Danny has excelled at Northwestern in a variety of circumstances and conditions. He will be a steady presence in chambers. I get the sense—based on his professional commitment to rigorous and honest auditing; his internship at the SEC; his volunteer work at the law school with the StreetLaw project; and his longtime public service in his hometown of Seattle—that Danny has a strong moral compass. But I think he will benefit from the opportunity to practice that sense of ethics and public service as a judicial clerk. I think it's pretty clear that Danny is headed for big things in his legal career, and he will both benefit from and deeply appreciate the mentorship and guidance that you can offer.

I hope you will take the opportunity to meet with Danny. I think he would be a strong asset to any judge's chambers. If you have further questions about Danny's candidacy, I would be happy to set up a time to talk. My e-mail address is p-dicola@law.northwestern.edu. Thank you very much for your time and for considering Danny's application.

Respectfully,

Peter C. DiCola
Professor of Law
Northwestern Pritzker School of Law

WRITING SAMPLE

Daniel Damitio
860 N. DeWitt Pl.
Chicago, IL 60611
(425) 492-0019

The attached writing sample is an excerpt from a brief submitted for the 2021 Chicago Bar Association Moot Court Competition. The fictional case involved Hailey Hatterfield's suit against the Keystone Quick Care ("KQC") health clinic. KQC had texted her the results of a blood test against her express instructions to communicate the results via call. Since the text also contained a business promotion, Ms. Hatterfield sued KQC for a violation of the Telephone Consumer Protection Act as well as invasion of privacy. The questions presented for competition were:

1. Whether a consumer must suffer actual concrete damages for that consumer to have standing to sue under the Telephone Consumer Protection Act.

2. Whether an unsolicited text message disclosing blood test results would be highly offensive to a reasonable person as defined by section 625B of the Second Restatement of Torts.

Along with my partner, I represented the respondent, Ms. Hatterfield. My writing sample includes the portion of the brief addressing the first question on standing, which I authored independently. The only element of standing in dispute involved whether Ms. Hatterfield adequately alleged injury in fact.

ARGUMENT

I. KEYSTONE QUICK CARE'S VIOLATION OF THE TCPA CAUSED MS. HATTERFIELD TO SUFFER A CONCRETE INTANGIBLE HARM WHICH SATISFIES THE INJURY IN FACT REQUIREMENT.

Injury in fact asks whether harm has occurred. While quantifiable, tangible damages provide one sufficient answer to that question, the presence of tangible damages is not necessary for injury in fact to be satisfied. In this case, Ms. Hatterfield has valid standing to sue without alleging actual damages because she suffered intangible harm of a type (1) which Congress identified as actionable, and (2) which bears a close relationship to traditionally actionable common law harms.

Injury in fact requires "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent" rather than "conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). While a concrete injury must be *de facto*, "intangible injuries can nevertheless be concrete." *Spokeo*, 578 U.S. 330, 340 (2016). "Both history and the judgment of Congress play important roles" in evaluating whether an intangible harm satisfies the injury in fact requirement. *Id.* To satisfy injury in fact with an intangible harm, a plaintiff must allege harm (1) which Congress has identified as sufficient to support a legal cause of action, and (2) which bears a close relationship to another common law harm "traditionally recognized as providing a basis for lawsuits in American courts." *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204–06 (2021).

In this case, Ms. Hatterfield has both Congress and the common law in her corner. Keystone Quick Care's (KQC) undisputed violation of the TCPA, therefore, need not have caused actual concrete harm to Ms. Hatterfield. The intangible harm alleged by Ms. Hatterfield is itself sufficient to support the injury in fact requirement of Article III standing.

A. Congress' Enactment of the TCPA Identified the Type of Harm Suffered by Ms. Hatterfield As Concrete.

Ms. Hatterfield's receipt of KQC's unsolicited and commercial text message to her personal phone caused her to suffer the concrete harms of nuisance and invasion of privacy. Congress identified and protected against both of these harms in the TCPA. As the lawmaking branch, Congress is particularly "well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo*, 578 U.S. at 341. Congress may not "enact an injury into existence," but it does hold the power to "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2204–05 (citing *Spokeo*, 578 U.S. at 341). Thus, in a case arising from a violation of statutory rights, a plaintiff who suffered difficult-to-measure concrete harm "need not allege any *additional* harm beyond the one Congress has identified." *Spokeo*, 578 U.S. at 342.

Congress' enactment of the TCPA responded to consumers' "outrage[] over the proliferation of intrusive, nuisance calls" from telemarketers. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, ¶ 6, 105 Stat. 2394, 2394 (1991).

Congress concluded that "banning such automated or prerecorded telephone calls to the home . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." TCPA § 2, ¶ 12. Although telecommunications technology has advanced since Congress enacted the TCPA, the same restrictions apply to protect consumers from the harm caused by unsolicited commercial calls and texts made to their personal cell phones. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii).").

The Fifth Circuit recently provided three justifications for expanding the protections offered by the of TCPA beyond home landlines to mobile cell phones. *Cranor v. 5 Star Nutrition*, 998 F. 3d 686 (5th Cir. 2021). First, the TCPA prohibits unsolicited commercial calls to "any telephone number assigned to a . . . cellular telephone service," 47 U.S.C. § 227(b)(1)(A)(iii), which includes mobile cell phones. *See Cranor*, 998 F.3d at 690–91. As the Fifth Circuit recognized, "if the state only prohibited nuisances *in the home*, then it would make little sense to prohibit telemarketing to mobile devices designed for use *outside the home*." *Id.* Second, the TCPA applies in several nonresidential contexts, meaning Congress "sought to remediate 'nuisance and invasion of privacy' in a broader set of circumstances, not just the home." *See id.* at 691 (citing 47 U.S.C. § 227(b)(1)(A)) Finally, Congress' statutory grant of discretion to the FCC for the implementation of the TCPA in no way "limits the FCC to considering nuisances and privacy only in the home." *See id.*

The Fifth Circuit's analysis of the TCPA accords with the majority of its sister circuits. *See, e.g.*, *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) ("[T]elemarketing text messages . . . present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA."); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2nd Cir. 2019). *But see Salcedo v. Hanna*, 936 F.3d 1162, 1168-70 (11th Cir. 2019) (holding that the receipt of a single text message falls outside the scope of the harm Congress sought to protect through the TCPA).

Here, Ms. Hatterfield suffered the precise injury which Congress identified as arising from unregulated telemarketing activity. Congress constructed the TCPA with a broad scope to protect consumers like Ms. Hatterfield from any unsolicited commercial telecommunications that cause concrete harms of nuisance and invasion of privacy, whether those harms occur via residential landline or personal cell phone. *See Cranor*, 998 F.3d at 690–91. Ms. Hatterfield adequately alleged the precise concrete harm that Congress identified under the statute. Under this Court's jurisprudence, that harm alone will support injury in fact.

B. Ms. Hatterfield Suffered Intangible Harm Bearing a Close Relationship To Harm Traditionally Recognized Under the Common Law Tort of Intrusion Upon Seclusion and Trespass to Chattels.

Congress may elevate harms previously not cognizable under the law. But even Congress may lack the unilateral power to create concrete harms out of nothing. Enter the common law. When evaluating concreteness, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 578 U.S. at 340–41 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)). If intangible harm elevated by Congress also closely resembles harm which the common law recognized as actionable, the Court may confidently conclude that a concrete injury exists. Here, the harm suffered by Ms. Hatterfield closely resembles the common law torts of intrusion upon seclusion and trespass to chattels

The comparison of modern intangible harms to established common law harms anchors the judicial branch to tradition and promotes a healthy separation of powers. Even so, this Court recognizes that "*Spokeo* does not require an exact duplicate in American history and tradition." *TransUnion*, 141 S. Ct. at 2204. When analyzing an intangible harm's relationship to a traditionally recognized common law analogue, the "inquiry is focused on types of harms protected at common law, not the precise point at which those harms become actionable." *Krakauer v. Dish Network*, 925 F.3d 643, 654 (4th Cir. 2019). In simpler terms, a close relationship to the common law must be one "in kind, not degree" *Gadelhak,* 950 F.3d at 462–62. Thus, a plaintiff need not show that they suffered harm to an actionable degree under a traditional

common law cause of action. They only need to show that the harm they suffered, however slight, is related in *kind* to the analogous common law claim.

1. *Ms. Hatterfield suffered intangible harm bearing a close relationship to the traditional common law tort of intrusion upon seclusion.*

The common law tort of intrusion upon seclusion covers one "who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns." RESTATEMENT (SECOND) OF TORTS § 625B (AM. L. INST. 1975). Cell phones contain a vast repository of private knowledge, and this Court has recognized that "[w]ith all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'" *Riley v. California*, 573 U.S. 373, 403 (2014) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886). Ms. Hatterfield explicitly instructed KQC that she did not wish to receive messages to her private cell phone. KQC disregarded her express instructions and intruded upon the expectation of privacy held by Ms. Hatterfield in her phone. This intrusion caused Ms. Hatterfield to suffer an irritating intrusion of the type traditionally recognized under intrusion upon seclusion.

In *Gadelhak*—a recent TCPA case where defendant sent unauthorized text messages to a private cell phone—the Seventh Circuit held that "the harm posed by unwanted text messages is analogous" to judicially recognized intrusion upon seclusion claims for other "irritating intrusions." 950 F.3d at 462. This Court recently cited the Seventh Circuit's analysis in *Gadelhak* as an example of an intangible harm

that may properly be analogized to the common law tort of intrusion upon seclusion. *See TransUnion*, 141 S. Ct. at 2204.

Here, like the plaintiff in *Gadelhak*, 950 F.3d at 460, Ms. Hatterfield gave notice to a business that she did not wish to receive any texts to her private phone. When KQC disregarded that request and messaged Ms. Hatterfield, it committed an irritating intrusion upon the significant privacy interests she held in her phone. The fact that Mr. Gadelhak received multiple messages compared to only one in this case does not impair the application of the Seventh Circuit's reasoning here. The difference in number of texts concerns only the degree of harm which each plaintiff suffered. It does not modify the kind of harm—an irritating intrusion—otherwise implicated in both cases.

Even slight harm of the proper type can be sufficiently concrete to support injury in fact. KQC's violation of the TCPA caused Ms. Hatterfield to suffer an irritating intrusion of the type recognized under a traditional intrusion upon seclusion action. She has therefore met her burden to establish injury in fact.

2. *Ms. Hatterfield suffered intangible harm bearing a close relationship to the traditional common law harm of trespass to chattels.*

Intrusion upon seclusion is not the only type of traditional common law harm implicated in this case. Trespass to chattels provides a remedy against a person who dispossesses, impairs, or materially deprives another of their interest in a piece of property. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 218(a)–(c) (AM. L. INST. 1975). The modern conception of this common law action, as described in the Restatement

(Second) of Torts, resists providing for recovery in the case of a momentary or "fleeting infraction upon personal property." *Salcedo*, 936 F.3d at 1172. In *Salcedo*, the Eleventh Circuit relied exclusively on this Restatement (Second) definition to deny that a single text message—sent in violation of the TCPA—could share a close relationship to trespass to chattels. *Id.* But by relying only on a modern Restatement, the Eleventh Circuit limited the proper scope of this inquiry.

The appropriate framework for evaluating a close relationship to the common law "is grounded in historical practice," *see Spokeo*, 578 U.S. at 341. But the Restatement does not always align precisely with traditional understandings of common law torts. While actual damages are necessary to sustain a trespass to chattels claim under the Restatement (Second), the historical common law allowed recovery if there was a violation of the "dignitary interest in the inviolability of chattels." *See* PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 90, at 87 (5th ed. 1984). This principle meant that historically, "trespass to chattels [was] actionable *per se* without any proof of actual damage." *Cranor*, 998 F.3d at 693 (quoting JOHN W. SALMOND, LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 331 (1907)). As the Fifth Circuit held, "an action might lie even where, as here, the alleged tortfeasor never physically touched the claimant's property." *Id.*

Although Ms. Hatterfield alleges no actual damages arising from KQC's violation of the TCPA, the unsolicited text message nonetheless violated her dignitary interest in exercising exclusive control over her possessions. By sending a

text message against Ms. Hatterfield's explicit instructions, KQC interfered with the way in which Ms. Hatterfield desired to use and control her own property.

The harm suffered by Ms. Hatterfield due to KQC's violation of the TCPA closely relates to this conception of dignitary harm—which provided a *per se* basis for suit under the historical concept of trespass to chattels in English and American courts. *See* PROSSER & KEETON § 90, at 87 (5th ed. 1984). Thus, Ms. Hatterfield alleged harm that is sufficiently concrete to satisfy the injury in fact requirement and convey proper Article III standing.

Applicant Details

First Name	**Page**
Last Name	**Garbee-Kim**
Citizenship Status	**U. S. Citizen**
Email Address	**pag8gy@virginia.edu**
Address	**Address** Street **1622 5th Street N.W.** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**4346606397**

Applicant Education

BA/BS From	**Syracuse University**
Date of BA/BS	**May 2015**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 23, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rutherglen, George
grutherglen@law.virginia.edu
(434) 924-7015
Robinson, Kimberly
krobinson@law.virginia.edu
434-924-3181
Gardner, Mary
mgardner@venable.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Page Garbee-Kim

1622 5th Street N.W., Unit B Washington, DC 20001 | pag8gy@virginia.edu | (434) 660-6397

June 10, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am a University of Virginia Law alumna hoping to clerk in your chambers for the 2024-25 term or later. As a first-generation law student who was the first in my family to move off our farm, I hope to bring a unique perspective to your chambers. Due to the limited opportunities that my hometown provided, I started college at 15, attending a local community college, while simultaneously working two jobs. I later transferred to Syracuse University, where I graduated *summa cum laude* at 19 — completing a double major and the honors curriculum while working full-time to fund my education. After graduation, I accepted a position teaching at a public charter school in Ward 8. Though teaching was incredibly rewarding, my passion for writing and legal analysis led me to apply to law school, and I currently work at Venable, LLP as a litigation associate.

During my legal career, I have refined my research and writing skills through internships with Chief Judge Beryl Howell at the D.D.C. and as a Submissions Editor for the Virginia Journal of International Law. At Venable, I have been afforded the opportunity to take on tasks that are typically reserved for mid- to senior-level associates, such as taking depositions of key witnesses and drafting multiple motions for summary judgment in their entirety. While my work at Venable has offered the chance to participate in various portions of mediations, arbitrations, and trials, opportunities to experience litigation from start to finish are rare. A clerkship under your guidance will accelerate my development as a litigator and continue to hone my legal research and writing skills.

Please find my resume, writing sample, and law school transcript attached. Thank you for your time and consideration.

Sincerely,

Page Garbee-Kim

Page Garbee-Kim

Page Garbee-Kim

1622 5th Street N.W., Unit B Washington, DC 20001 | pag8gy@virginia.edu | (434) 660-6397

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., May 2021

- Virginia Law Scholarship (merit-based scholarship)
- *Virginia Journal of International Law*, Submissions Editor
- Student Bar Association, 2L Senator and Health & Wellness Committee Chair
- Volunteering: Street Law, Director of Curriculum; Lambda Law Alliance; Virginia Law First-Generation Professionals; Virginia Law Women; Child Advocacy Clinic

Syracuse University, Syracuse, NY
B.S., Political Science and Rhetorical Studies, *summa cum laude*, May 2015

- Renee Crown University Honors Program Thesis: A Comparison of Communication Practices in Hazing and Domestic Violence Situations
- Mary E. Earle Endowed Prize (for excellence in research and writing)
- White Denison Grand Prize (in recognition of exemplary public speaking)

EXPERIENCE

Venable, LLP, Washington, DC
Litigation Associate, June 2020 – Present

- Managed work across numerous practice areas, including labor and employment, advertising, and insurance
- First-chaired deposition in complex litigation matter, including the development of strategy and questions
- Drafted substantive memoranda in both litigation and regulatory matters, including motions for summary judgment, discovery motions, motions to compel, white papers, and reverse FOIA requests
- Analyzed and revised complex contracts and documents, including insurance policies, separation agreements, settlement agreements, and employment policies

The Honorable Beryl A. Howell, United States District Court (D.D.C.), Washington, DC
Judicial Intern, May – August 2019

- Conducted legal research on civil and criminal matters pending before the court
- Drafted internal memoranda on the rules of civil procedure, international law, and administrative law
- Completed cite checks for opinions on administrative law, civil damages, and other final orders
- Drafted portions of opinions including sections on questions of standing, statutory background, case-specific facts, and procedural history

Legal Aid Justice Center, Just Children Program, Charlottesville, VA
Volunteer, August 2018 – May 2019

- Served as liaison between clients and supervising attorneys, conducted intake interviews, and reviewed cases in order to provide free representation to low-income families and ensure equitable education outcomes

Achievement Preparatory Academy, Washington, DC
Teacher, August 2015 – June 2018

- Chair of the Co-Curricular Team, Reader Leader Committee (encouraged scholar achievements in literacy), MAP/PARCC Testing Committee (organized school-wide testing and partnered with families to increase preparedness), and the SOW Committee (created incentives for positive scholar behavior)
- Awarded Teacher of the Month in June 2017 and March 2018 for leadership and innovation by designing the first performing and visual arts curriculum in an under-resourced district

Community for Learning Advancement, Lynchburg, VA
Associate Director & Founder, May 2015 – July 2017

- Crafted the mission statement, by-laws, and various marketing materials to provide educational supplies and scholarships across 13 public schools in the county
- Responsible for fundraising, public speaking, and donor relationship management
- Supplemented work with legislative advocacy, particularly for increased school funding and gifted education programs

INTERESTS

- Farming and Animal Husbandry; Watercolor Painting; Vintage Teacups; Barre Instructor

Page A Garbee

09/18/2021

Degrees Conferred

Confer Date:	05/23/2021
Degree:	Juris Doctor
Major:	Law

Beginning of Law Record

2018 Fall

School:		School of Law		
Major:		Law		
LAW	6000	Civil Procedure	B+	4.0
LAW	6002	Contracts	B+	4.0
LAW	6003	Criminal Law	A-	3.0
LAW	6004	Legal Research and Writing I	S	1.0
LAW	6007	Torts	B	4.0

2019 Spring

School:		School of Law		
Major:		Law		
LAW	6001	Constitutional Law	B+	4.0
LAW	6005	Lgl Research & Writing II (YR)	S	2.0
LAW	6006	Property	A-	4.0
LAW	6104	Evidence	A-	4.0
LAW	7023	Emply Law: Contrcts/Torts/Stat	A-	3.0

2019 Fall

School:		School of Law		
Major:		Law		
LAW	8606	Child Advocacy Clinic (YR)	CR	4.0
LAW	9074	Legis Drafting & Public Policy	B+	3.0
LAW	9089	Seminar in Ethical Values (YR)	YR	0.0
LAW	9294	Drug Prod Liability Litgn Sem	A-	2.0
LAW	9324	Law, Inequality & Educ Reform	A-	3.0

2020 Spring

School:		School of Law		
Major:		Law		
LAW	7064	Nonprofit Organizations	CR	3.0
LAW	7071	Professional Responsibility	CR	2.0
LAW	7105	Modern Real Estate	CR	3.0
LAW	7163	Legislation and Regulation	CR	4.0
LAW	8607	Child Advocacy Clinic (YR)	CR	4.0
LAW	9090	Seminar in Ethical Values (YR)	CR	1.0

2020 Fall

School:		School of Law		
Major:		Law		
LAW	7022	Employment Discrimination	A-	3.0
LAW	7795	Art Law (SC)	A-	2.0
LAW	7808	Cryptocurrency Reg (SC)	A	1.0
LAW	8009	Copyright Law	B+	3.0
LAW	8026	Taking Effective Depositions	A-	2.0
LAW	9087	Internatl Environmental Law	A	3.0

2021 Spring

School:		School of Law		
Major:		Law		
LAW	6102	Administrative Law	A	4.0
LAW	7014	Conflict of Laws	A	3.0
LAW	7103	Education Law Survey	A	3.0
LAW	7820	Higher Education & Law (SC)	A-	1.0
LAW	7825	Internal Investigations (SC)	A-	1.0

End of Law School Record

June 12, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am writing on behalf of Page Garbee-Kim, a recent graduate of our law school, who has applied for a clerkship with you. Page received an A- in my course in Employment Discrimination. She was an active and effective participant in our class discussions and she has an exemplary record in law school. I am happy to recommend her to you.

Employment Discrimination is a demanding course, at several different levels. The burden of proof on a variety of issues is decisive in many cases. This introduces a degree of doctrinal complexity into the course. It also raises practical problems for attorneys bringing or defending against claims of employment discrimination. In close cases, everything turns on who has the burden of proof and what it requires. As a matter of principle, the course addresses the many different meanings of equal opportunity and how it can be implemented through the law. Page did quite well in navigating these different issues, both abstract and concrete in the course. She was also a lively and welcome presence in our class discussions.

Page has been very active in the life of the law school. She was the submissions editor on the Virginia Journal of International Law and served in a variety of other student organizations. She currently practices law as a litigation associate at the Venable firm in Washington, D.C. She expects to continue her career in litigation and she sees a clerkship as a valuable learning experience, where she can see first hand how cases are litigated and how decisions are made.

Just as a clerkship would contribute to her career plans, she would be a valuable addition to any judge's chambers. She met the disruptions to legal education caused by the pandemic with poise and equanimity, adjusting well to the remote learning and social distancing that has dominated the law school experience during her time in law school. Based on this experience, I believe she is well suited to meet the challenges of a clerkship. She has the intellectual and personal qualities to be an excellent law clerk and I strongly recommend her to you.

Very truly yours,

George Rutherglen
Distinguished Professor of Law
Earle K. Shawe Professor of Employment Law
University of Virginia School of Law
580 Massie Road Charlottesville, VA 22903-1738
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June 10, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am writing to highly recommend Ms. Page Garbee-Kim, who has applied for a clerkship in your chambers. Ms. Garbee-Kim possesses the excellent analytical, research and writing skills as well as the professionalism and drive that will make her a great law clerk for any judge who is fortunate enough to hire her.
I have had the privilege of getting to know Ms. Garbee-Kim in two courses at the University of Virginia School of Law. I first met Ms. Garbee-Kim when she took my seminar titled Law, Education and Inequality in the fall of 2019. The seminar analyzes how law and policy contributes to opportunity and achievement gaps in education and explores potential avenues for remedying these gaps and strengthening democracy. Ms. Garbee-Kim also took my spring 2022 Education Law Survey course, which provides an overview of a wide variety of education law issues, such as school desegregation, school funding, and school choice. Through these courses, I have had the opportunity to get to know Ms. Garbee-Kim well.

Throughout both courses, Ms. Garbee-Kim consistently offered insightful comments that built upon not only the reading, but also her own experiences as both a former teacher in a charter school in Washington, D.C. and someone who grew up with limited opportunities in a small town. Her perspective and the experiences that she shared in my courses deepened the understanding of her classmates and me regarding the topics that we studied. Ms. Garbee-Kim was always a professional, mature and engaged student who persuasively presented her thoughts on the course topics. In addition to her strong performance in my courses, Ms. Garbee-Kim distinguished herself amidst her many talented peers at the University of Virginia School of Law. She served as a 2L Senator for the Student Bar Association and earned a place on the Executive Board of the Virginia Journal of International Law while contributing to the community through volunteer work for such organizations as Virginia Law Women and Lamda Law Alliance.

My greatest insight into Ms. Garbee-Kim's potential to be an exceptional law clerk was through her paper for my seminar. She thoroughly synthesized social science researching regarding how inequity in testing accommodations is evident in the overrepresentation of affluent, white students and the underrepresentation of poor, minority students. Ms. Garbee-Kim summarized and critiqued how the statutes that govern how schools address disabilities contributes to these challenges and she examined the law and policy scholarly proposals for reform. She then offered a multifaceted law and policy approach for addressing these challenges that would combine amendments to federal disability law that would remove barriers to equitable accommodations and increases to federal data collection to reduce accommodations awarded through fraudulent means while minimizing barriers to entry for minority students. Ms. Garbee-Kim's paper demonstrated that she possesses outstanding research, analytical and writing skills. Her research on the twin weaknesses of this area of disability law was thorough and comprehensive and her writing regarding the relevant law and policy was clear and cogent. She presented her analysis and arguments in a well-organized and logical format. She earned an A on the paper. Her first-rate analytical, research and writing skills will greatly benefit and support the work of any judge. In addition, her ability to present her analyses and insights in a clear, cogent and persuasive manner will cause her to be a valuable contributor to discussions within chambers.

Ms. Garbee-Kim's upbringing in a small town (Lynchburg, Virginia) with limited opportunities provided her with very little exposure to the legal profession. Nevertheless, she started to dream of becoming a lawyer at the age of seven and began sharing this dream with those around her. This dream led her to major in political science at Syracuse University and graduate at nineteen, with the intention of taking a few years off before going to law school. Ms. Garbee-Kim then began working as a teacher in a Washington, DC Public Charter School and found her passion and purpose: to find legal solutions to educational inequality. She decided that she wanted to help others experience the same opportunity mobility that education had afforded her. At the University of Virginia Law School, Ms. Garbee-Kim focused her energy and attention on preparing for her career in education law and policy by not only excelling in my education law courses, but also by participating in the Child Advocacy Clinic and serving on the Executive Board of Street Law. Ms. Garbee-Kim's early graduation from college reveals that the focus and determination that she displayed in law school began at a young age. After law school, Ms. Garbee-Kim accepted a job at Venable, a law firm that represents the most independent schools in the nation. She currently works at the intersection of education, employment, and litigation. After serving as a law clerk, Ms. Garbee-Kim hopes to pursue a career in education law at the United States Department of Education.

I encourage you to interview Ms. Garbee-Kim so that you may witness her many positive qualities for yourself. Please do not hesitate to contact me if I may provide more information about her. I may be reached at krobinson@law.virginia.edu or 404-308-6821 (cell).

Sincerely,

Kimberly Jenkins Robinson

VENABLE LLP

600 MASSACHUSETTS AVE., NW WASHINGTON, DC 20001
T 202.344.4000 F 202.344.8300 www.Venable.com

June 13, 2022

Mary M. Gardner

T 202.344.4398
F 202.344.8300
MMGardner@Venable.com

Re: Recommendation for Page Garbee Kim's Selection for a Federal Judicial Clerkship

To Whom it May Concern:

It is my pleasure to write this letter of recommendation for Page Garbee Kim in support of her application for a federal judicial clerkship. I highly recommend Page for a judicial clerkship.

I first met Page when she was a summer associate at Venable LLP in 2020. Page stands out as one of the most impressive candidates with whom I've worked in my (now) six years of work with Venable's summer associates. She assisted me with a complex assignment for a hospitality group regarding the availability of insurance proceeds for COVID-19 related business interruptions. Since returning to Venable in September 2021, I have worked with Page at every possible opportunity. Indeed, she is the first associate I turn to when I have a new case or research question. Page has assisted me with the following work assignments: She answered complicated research assignments in the insurance and advertising compliance fields, played an integral role in trial preparation for a case pending in the District of Maryland, drafted a substantive portion of a brief in opposition to a motion for summary judgment, and researched and drafted most of a response to an arbitration complaint.

Page has many strengths that make her an exceptional associate. In this letter, I would like to highlight four strengths that I believe make Page a highly competitive applicant for a judicial clerkship.

First, Page has strong research and writing skills. When Page was a summer associate, I evaluated her research and writing skills as comparable to those of a seasoned third- or fourth-year associate, rather than a law school student. Indeed, Page's final work product was so well done that I struggled to find constructive feedback to give her. Page has excelled in the two years that have passed. She recently drafted an almost 40-page response to an arbitration complaint—an assignment that I would usually give to a fourth- or fifth-year associate. She demonstrated a strong understanding of the facts of the case, her research uncovered compelling case law and statutory support for her argument, and her analysis of how the law applied to the facts was sound. Ultimately, her draft was clean, organized effectively, and well-written.

Second, Page is a strong communicator. The year that Page participated in Venable's summer program, the program was offered virtually with no opportunity to meet in person. Several

VENABLE LLP

candidates struggled with communication in a virtual office—but not Page. Page has continued to excel at communication in a hybrid office environment. She provides timely updates on the status of assignments and is comfortable communicating directly with clients. Significantly, Page is a strong and confident advocate. If she disagrees with my analysis of an issue, she will respectfully raise her concerns. These discussions with Page have become an integral part of my deliberative process.

Third, Page is well-organized. When Page is assigned to a new case, she prioritizes ensuring that the relevant documents are organized. In fact, I have derived great benefits from Page's disciplined approach to file management. When Page returned to Venable last year, she joined one of my pending cases and immediately took ownership of organizing the document repository.

Finally, Page is a pleasure to work with. She is collaborative, energetic, responsible, and hard working. Several days last week, Page worked late nights and early mornings, without losing her good-natured manner or sacrificing the quality of her work product.

I give my full recommendation to Page.

Sincerely,

Mary M. Gardner

Page Garbee-Kim

1622 5th Street N.W., Unit B Washington, DC 20001 | pag8gy@virginia.edu | (434) 660-6397

The attached writing sample is a Reply Memorandum of Law in Support of a Motion for Summary Judgment that I drafted for a pro bono case, *Tempey v. U.S. Dep't of Homeland Sec.*, Case No. 20-cv-5212 (ENV)(SJB), which is currently pending in the United States District Court for the Eastern District of New York. Since filing, it has been lightly edited for clarity and includes additional facts and law from a previous briefing for context. While I was supervised by a partner, Ian Volner, the writing sample contains minimal revisions and represents my own work.

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PRELIMINARY STATEMENT

The Department of Homeland Security ("DHS," "Defendant," or "Agency") invokes the deliberative process exemption to shield the identity of the individual(s) who may have embedded white-supremacist messaging in an official government press release (the "Press Release"). While DHS characterizes its actions as cooperative, Def.'s Reply at 1, the Agency omits and obscures several pertinent facts from the timeline, revealing that it has been delaying and obfuscating the release of statutorily mandated information.

Plaintiff submitted a Freedom of Information Act ("FOIA") request to DHS on August 9, 2018 (the "Request"). Tempey Decl. at ¶ 7; Def.'s 56.1 Stmt. at ¶ 5. Plaintiff's Request sought documentation, background material, messages, and correspondence related to the drafting of the Press Release. Tempey Decl. at ¶ 7; Def.'s 56.1 Stmt. at ¶ 6. Despite its statutory obligation to respond to FOIA requests within 20 working days, DHS did not provide a substantive response to Plaintiff's Request until nearly two years later. Tempey Decl. at ¶ 14; Def.'s 56.1 Stmt. at ¶ 10; 5 U.S.C. § 552(a)(6)(A)(i).

On March 27, 2020, James V.L.M. Holzer, Deputy Chief FOIA Officer for DHS, denied Plaintiff's Request. Tempey Decl. at ¶ 14; Def.'s 56.1 Stmt. at ¶ 10. In lieu of producing responsive materials to Plaintiff's Request, DHS referred Plaintiff to twenty-four pages of heavily redacted documents posted to DHS's website. *Id*. The Agency's final response took over 400 working days to process and failed to outline the reasons underlying the agency's response as the statute requires. *See* 5 U.S.C. § 552(a)(6)(A)(i)(I). After exhausting all applicable administrative remedies, Plaintiff brought this action on November 12, 2020, alleging that DHS failed to conduct a proper or sufficient search for records responsive to Plaintiff's Request in violation of its obligations under FOIA. Tempey Decl. at ¶¶ 15-16; Def.'s 56.1 Stmt. at ¶ 14. Thereafter, the

parties were able to negotiate an expanded search, and on March 16, 2022, DHS produced an additional 236 pages of documents. Tempey Decl. at ¶ 17; Def.'s 56.1 Stmt. at ¶¶ 16-17. However, DHS continues to shirk its obligations under FOIA. The vast majority of the pages provided are either duplicative and/or heavily redacted. DHS claims its redactions and withholdings are justified under Exemptions 5 and 6 of FOIA. *See* Vaughn Index; *see also* 5 U.S.C. § 552(b)(5)-(6). Critically, all draft versions of the Press Release are withheld in their entirety. March 16 Document Production, Bates Stamp Nos. DHS-001-02512-000004 through DHS-001-02512-000018; August 3 Document Production, Bates Stamp Nos. DHS-001-02512-000237 through DHS-001-02512-000245. As such, the documents fail to shed any light on the pertinent issues at hand, including the entire universe of people involved in the Press Release, the drafting history of the Press Release, or how DHS decided on the incendiary title of the Press Release.

Defendant's extensive redaction of these documents under broad claims of exemption pursuant to Exemptions 5 and 6 is a continued attempt by the Government to sidestep its FOIA obligations. The burden to justify its withholding lies with DHS, and it has failed to meet this burden. *Cook v. Nat'l Archives & Recs. Admin.*, 758 F.3d 168, 173 (2d Cir. 2014) (quotation marks and citation omitted). *See also* 5 U.S.C. § 552(a)(4)(B). Because courts should construe FOIA exemptions narrowly, and analyze facts and inferences in the light most favorable to the requester, Plaintiff's Cross-Motion for Summary Judgment should be granted, and Defendant's Motion should be denied. *Katzman v. Freeh*, 926 F. Supp. 316, 320 (E.D.N.Y. 1996) (citing *Becker v. IRS*, 34 F.3d 398, 405 (7th Cir. 1994)).

ARGUMENT

I. DHS IMPROPERLY APPLIED EXEMPTION 5.

A. DHS Has Not Satisfied Its Burden to Show That the Deliberative Process

Privilege Applies to Drafts of the Press Release.

DHS's application of Exemption 5 to drafts of the Press Release and other associated communications was improper because the Press Release conveys a prior agency decision and is therefore not deliberative. While documents reflecting judgment calls about how to convey an agency decision may be properly withheld, the exemption only applies to the "document that first communicates a policy decision." *Campaign Legal Ctr. v. U.S. DOJ*, 34 F.4th 14, 24 (D.C. Cir. 2022) (emphasis added). This is because this initial document may "shape[] and sharpen[] the underlying policy judgment or [] have direct consequences for ongoing agency programs and policies." *Id*. (citing *Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 362-64 (D.C. Cir. 2021)). Here, as Defendant acknowledges, this Press Release was not the first document to communicate the Trump administration's plan to ensure border security. Def.'s Reply at 4 (discussing the issuance of Executive Order 13767). Nor was the Press Release the Agency's first communication on the matter. For example, on February 21, 2017, DHS issued a document "designed to answer some frequently asked questions about how the Department will operationally implement the guidance provided by [EO 13767]."[1] Defendant cannot claim that these documents reflect deliberation on "how to best relay to the public that the former administration, through DHS, intended to ensure border security and its reasons for favoring a border wall" when the public was already informed of the decision in the months and years prior. Def.'s Reply at 5. Therefore, the Press Release is an advocacy piece, created to "support a decision already made." *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184 (1975)). As such, its drafts are not properly withheld under Exemption 5.

[1] DEP'T OF HOMELAND SEC., Q&A: DHS IMPLEMENTATION OF THE EXECUTIVE ORDER ON BORDER SECURITY AND IMMIGRATION ENFORCEMENT (2017).

Additionally, the deliberative process privilege protects documents only if they are *both* deliberative and pre-decisional. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (internal citations omitted). A document is pre-decisional if it is "generated before the adoption of an agency policy." *Jud. Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Documents that simply "promulgate or implement an established policy of an agency" are not pre-decisional. *BuzzFeed, Inc. v. U.S. DOJ*, 419 F. Supp. 3d 69, 76 (D.D.C. 2019) (citing *Brinton v. U.S. Dep't of State*, 636 F.2d 600, 605 (D.C. Cir. 1980)). Where an agency "hides a functionally final decision in draft form, the deliberative process privilege will not apply. After all, what matters is not whether a document is last in line, but whether it communicates a policy on which the agency has settled." *Campaign Legal Ctr*, 34 F.4th at 24 (quoting *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 786-88 (2021) (internal quotation marks and alterations omitted) (emphasis added).

The Agency's own language in its February 21, 2017 Q&A indicates it is hiding a functionally final decision as a draft. Specifically, DHS states that the Q&A provides guidance on how the Agency "will operationally implement [EO 13767]." This is a strong indicator that the Q&A, and the subsequent Press Release at issue, is implementing the border policy that was established years before. Therefore, drafts of the Press Release and associated communications are not pre-decisional and may not be withheld pursuant to Exemption 5. Defendant has failed to meet its burden to justify the withholding. *Cook*, 758 F.3d at 173; 5 U.S.C. § 552(a)(4)(B).

B. DHS Has Not Satisfied Its Burden to Show That the Deliberative Process Privilege Applies to Documents Post-Dating the Issuance of the Press Release.

Defendant's justification for withholding the documents created after the issuance of the Press Release is similarly unpersuasive. While Exemption 5 may apply to communications regarding an agency's potential response, the agency must establish a link to a document that is

both pre-decisional and deliberative for the Exemption to apply. *See Grand Cent. P'ship, Inc.*, 166 F.3d at 482 (holding Exemption 5 "does not protect a document which is merely peripheral to actual policy formation"). Without this limitation, agencies would be permitted to withhold swaths of information by tying it to any decision, no matter how insignificant, creating the "overuse" of Exemption 5 that Congress viewed as a particular threat. *Ctr. for Investigative Reporting v. U.S. Customs & Border Prot.*, 436 F. Supp. 3d 90, 105 (D.D.C. 2019) (quoting H.R. REP. NO. 114-391, at 10 (2016)). Because the Press Release underlying the discussions is neither deliberative nor pre-decisional, the Court should reject the Defendant's application of Exemption 5 to documents post-dating the Press Release.

C. DHS Has Failed to Comply with FOIA's Segregability Requirement.

The Agency's failure to segregate portions of the record is also a violation of its obligations under FOIA. While DHS claims that it need not disclose factual information that is "inextricably intertwined," Def.'s Reply at 10, "[i]t is only in exceptional circumstances that 'disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted.'" *BuzzFeed*, 419 F. Supp. 3d at 77 (emphasis added) (quoting *Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)). This circumstance is not exceptional. As explained in Section I.A, the agency's choice of facts does not reveal the deliberative process because the policy decision was set in stone in the months and years prior. As such, the Defendant failed to disclose reasonably segregable portions of the record and did not discharge its obligations under FOIA. *See* 5 U.S.C. § 552(b)(9).

II. WHILE PLAINTIFF OPTED FOR LESSER INFORMATION, THERE IS NO PRIVACY INTEREST IN THE NAMES AND TITLES OF GOVERNMENT EMPLOYEES UNDER EXEMPTION 6.

Defendant's withholding of the names and titles of staff members involved in drafting the Press Release is also improper. There is no privacy interest in the names or job titles of government

employees, even at the staff level. *See Leadership Conf. on C. R. v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (finding no privacy interest in the names and telephone numbers of DOJ paralegals under Exemption 6, because "[a] name and work telephone number is not personal or intimate information… that normally would be considered protected information under Exemption 6."). Exemption 6 does not categorically exempt individuals' identities, as the privacy interest at stake varies depending on the context in which it is asserted. *Am. Oversight v. U.S. Gen. Sers. Admin.*, 311 F. Supp. 3d 327, 346 (D.D.C. 2018). Rather, the Exemption 6 analysis requires balancing the privacy interests in nondisclosure against the public interest in disclosure. *Id*. at 345. "[U]nless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail." *Id*. Here, the public interest outweighs the privacy interests because Defendant's harm is speculative. Additionally, the release of the employees' names, titles, and positions is in the public interest given the stakes and demonstrated public outcry and concern.

Defendant's speculative harm to a privacy interest is not sufficient to warrant nondisclosure under FOIA Exemption 6. *Jud. Watch, Inc. v. Dep't of the Navy*, 25 F. Supp. 3d 131, 142 (D.D.C. 2014) (holding the potential adverse consequences of disclosure must be real rather than speculative, and a bare assertion that a document's disclosure would constitute a clearly unwarranted invasion of an individual's personal privacy insufficient). Defendant's claims of the potential for "invasive harassment," without more, is not sufficient. Def.'s Reply at 8.

Additionally, the inclusion of a white-supremacist dog whistle in a DHS press release is serious, and the public has a genuine interest in the disclosure of the person(s) who were involved in the Press Release. In particular, the public has a heightened interest in the identities of the staff members who requested or provided information that was later used in the Press Release and were clearly involved in its drafting. *Compare* Vaughn Index, Bates Stamp Nos. DHS-001-02512-

000001 through DHS-001-02512-000003 ("The number of credible fear screening referrals has risen from fewer than 5,100 in 2008 to nearly 92,000 screenings in 2016 – a 1,700 percent increase.") *with* Press Release ("There has been a 1,700 percent increase in Credible Fear receipts from 2008 to 2016."). Despite Defendant's assertions to the contrary, disclosure of these names, as well as their positions and titles, would clearly "further the public's understanding of DHS's operations and activities" as it pertains to the drafting and response to the Press Release. Def.'s Reply at 10. *See also Osen LLC v. U.S. Cent. Command*, No. 18-cv-6069, 2019 WL 4805805, at *5 (S.D.N.Y. Sept. 30, 2019). As such, Plaintiff is entitled to the names of the employees, although initially opted to request the mere job titles of the relevant employees as a lesser request for information.

III. DHS HAS FAILED TO IDENTIFY A FORESEEABLE HARM, AS REQUIRED BY THE FOIA IMPROVEMENT ACT.

To satisfy its burden under the FOIA Improvement Act, the Agency must show that disclosure of the requested information would foreseeably harm a protected interest or that disclosure is prohibited by law; otherwise, it must disclose the information, even if the information falls within one of the FOIA exemptions. 5 U.S.C. § 552(a)(8)(A). Applicability of a FOIA exemption is still necessary—but no longer sufficient—for an agency to withhold the requested information. *Seife v. FDA*, 43 F.4th 231, 235 (2d Cir. 2022). Defendant's Reply continues to offer generalized, speculative assertions regarding the harm that disclosure will bring, which is insufficient to overcome its burden. *Jud. Watch, Inc. v. U.S. Dep't of Com.*, 375 F. Supp. 3d 93, 100 (D.D.C. 2019) (speculation about potential harm and boilerplate justifications are insufficient); *Amadis v. U.S. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020) (an agency's burden cannot be satisfied with "generalized assertions").

Defendant asserts that the redactions were necessary to protect its interest in candor among

employees. However, where a protected interest under Exemption 5 conflicts with a competing public interest, such as alleged government malfeasance, the exemption should be denied. *Tummino v. Von Eschenbach*, No. CV 05-366 (ERK)(VVP), 2006 U.S. Dist. LEXIS 81286, at *26-30 (E.D.N.Y. Nov. 6, 2006). Defendant's Reply does not contain any justification for why its interest in candor outweighs the competing interest of uncovering agency malfeasance. While Defendant attempts to characterize the public interest as a "purely speculative smoking gun," Def.'s Reply at 2, this characterization minimizes the disturbing nature of the headline and its striking similarities to white-supremacist propaganda. Additionally, the Agency's argument is circular. It claims there is nothing of note within the documents, and therefore, disclosure is unwarranted. If so, then the Agency proves Plaintiff's point that the government's interest is minimal.

Thus, even assuming *arguendo* that the exemptions claimed were sound (they are not), the deliberative process exemption should be denied because there is no foreseeable harm in the release of the documents. Furthermore, the Agency's public confusion rationale is defunct as a matter of law because withholding due to risk of misinformation is "condescending and at odds with the spirit of the FOIA." *W. Chi. v. U.S. Nuclear Regul. Comm'n*, 547 F. Supp. 740, 748 (N.D. Ill. 1982). Therefore, none of the reasons offered by Defendant are persuasive, and Defendant fails to meet its burden under the FOIA Improvement Act.

CONCLUSION

At its most basic level, the Freedom of Information Act safeguards the public's First Amendment right to know what decisions the government has made in its name and why it has made them. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). FOIA's deliberative process exemption allows the Government to serve the American public, free from interference, by limiting public disclosure. However, that protection ends when the deliberative process ends

and cannot justify suppression of information about the underpinnings of a settled policy determination, which the government seeks to defend on controversial terms. For the foregoing reasons, Plaintiff respectfully requests that the Court grant his Cross-Motion for Summary Judgment and deny Defendant's Motion.

Applicant Details

First Name	**Bianca**
Last Name	**Herlitz-Ferguson**
Citizenship Status	**U. S. Citizen**
Email Address	**bianca.herlitzferguson@gmail.com**
Address	**Address** Street **603 W 140th St Apt 31** City **New York** State/Territory **New York** Zip **10031** Country **United States**
Contact Phone Number	**9143162302**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2015**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**June 4, 2021**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Yale Law Journal**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Connecticut**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Dooley, Tadhg
tdooley@wiggin.com
203 498 4549

Sicklick, Jay
JSicklick@cca-ct.org
8607128822

Alstott, Anne
anne.alstott@yale.edu
_203_ 436-3528

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 15, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I am a 2021 graduate of Yale Law School and am writing to apply for a clerkship in your chambers for 2024-2025. I am a civil rights attorney with a longstanding commitment to and passion for advocating for children. My background, encompassing close to two years of public interest experience since graduating and a deep interest in legal ethics, has shaped my perspective on the law and cultivated a passion for justice.

I am currently a staff attorney with Children's Rights, a New York-based nonprofit, where I work exclusively on federal class-action litigation in multiple jurisdictions. My practice spans multiple bodies of law including Civil Procedure, Administrative Law, Constitutional Law, Disability Law, and Health Law. In my previous role as a legal fellow at the Center for Children's Advocacy, I provided direct legal services to children and young adults. That experience honed my skills for navigating legal challenges with compassion and empathy, as well as distilling complex legal terminology into clear and easy-to-understand language.

During law school, I served as an Executive Editor of the Yale Law Journal, where I oversaw both YLJ Forum, the Journal's online content, as well as Features and Book Reviews. That experience furthered my ability to engage with new bodies of law, collaborate effectively, and manage competing deadlines.

Beyond my legal skills and passion for public interest work, I bring a strong work ethic, attention to detail, and dedication to excellence in my work. My commitment to ethics is central to my professional identity and that dedication enables me to approach complex legal dilemmas with integrity, sound judgment, and a profound focus on the ethical responsibilities of the profession.

My resume, list of references, law school transcript, and writing sample are enclosed. Professor Anne Alstott, Clinical Lecturer Tadhg Dooley, and Jay Sicklick are submitting letters of recommendation on my behalf.

I am happy to provide any additional information you might seek and would welcome the opportunity to interview with you.

Thank you so much for your consideration.

Sincerely,

/s/ Bianca Herlitz-Ferguson

BIANCA HERLITZ-FERGUSON
603 W 140th St Apt 31, New York, NY 10031
bianca.herlitzferguson@gmail.com ♦ (914) 316-2302

EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D. 2021
Activities: *Yale Law Journal*, Executive Editor, *Forum*, Features & Book Reviews Vol. 130
Educational Opportunity and Juvenile Justice, Clinical Student 2020 – 2021
Youth Justice Project, Co-Founder & Co-Director 2020 – 2021
Professor Douglas Kysar, Research Assistant 2019 – 2020
Pediatric Medical Legal Partnership, Clinical Student 2019 – 2020
Marshall Brennan Constitutional Literacy Project, Teacher 2019 – 2020
Law, Ethics, and Animals Program, Student Fellow 2019 – 2020
Professor Anne Alstott, Research Assistant 2019
Black Law Student Association, Member 2018 – 2021

CORNELL UNIVERSITY, Ithaca, NY
B.A., *magna cum laude*, Government and Philosophy 2015
Honors: Clyde A. Duniway Prize, awarded annually to an outstanding student with a major in Government
Einhorn Discovery Grant Recipient, awarded for honors thesis research
Honors Thesis: *Assessing the Nature of Change: The Supreme Court and Juvenile Sentencing*
Activities: 4-Year NCAA Division I Diver, Women's Swimming & Diving 2011 – 2015
Writing Tutor, John S. Knight Institute Writing Walk-In Service 2012 – 2015
Crisis Counselor & Trainer, Empathy Assistance & Referral Service 2012 – 2015

EXPERIENCE

Children's Rights, New York, NY July 2022 – Present
Staff Attorney. Staff case teams pursuing federal class-action litigation on behalf of children and families. Research and draft memoranda analyzing federal statutory rights under Medicaid, the Americans with Disabilities Act, and the Rehabilitation Act of 1973. Draft trial court motions and briefs. Assist with discovery matters.

Fellowships at Auschwitz for the Study of Professional Ethics, Germany & Poland May 2023 – June 2023
Law Fellow. Participated in an intensive two-week fellowship that centered professional ethics by investigating the conduct and role of professionals in enabling the Nazi state and critically examining ethical issues in contemporary practice.

Center for Children's Advocacy, Bridgeport, CT September 2021 – July 2022
Singer Connecticut Public Service Fellow Attorney. Represented undocumented children in Connecticut probate courts to obtain special immigrant juvenile status findings. Represented transition-age youth and young adults over 18 in the care of the Connecticut Department of Children and Families in administrative hearings. Provided legal consultations to youth through a school-based legal clinic to alleviate legal barriers that interfere with students' abilities to succeed in school.

Advanced Appellate Litigation Project, New Haven, CT August 2020 – June 2021
Clinical Student & Qualified Law Student, Third Circuit. Represented a pro se client before the United States Court of Appeals for the Third Circuit. Drafted appellate briefs and argued client's appeal of the denial of his petition for habeas corpus under 28 U.S.C. § 2254.

U.S. Department of Justice, Civil Rights Division, Special Litigation Section, Washington D.C. Summer 2020
Intern. Conducted legal research and writing with respect to constitutional and civil rights of people in state and local institutions, individuals with disabilities, individuals who interact with state or local police, and youth involved in the juvenile justice system. Drafted memoranda on waiver of counsel and the *Rooker-Feldman* doctrine.

Youth Law Australia, Kingsford, Australia August 2019
Intern. Researched children's participation rights and barriers to exercising them in Australia's Family Law System. Conducted intakes with clients seeking legal advice on a wide array of issues affecting young people under 25 years of age.

University of Michigan Law School, Ann Arbor, MI May 2019
Bergstrom Child Welfare Law Fellow. Completed a selective fellowship at the University of Michigan focused on child welfare law and practice.

Office of the Defender General, Juvenile Division, Montpelier, VT May 2019 – July 2019
Summer Law Clerk. Drafted amicus and appellate briefs submitted to the Vermont Supreme Court. Reviewed discovery to assist with litigation related to civil rights violations. Interviewed clients and supported attorneys representing children in administrative proceedings.

Children's Rights, New York, NY 2016 – 2018
Paralegal. Supported attorneys pursuing large scale impact litigation to uphold the constitutional and civil rights of children in state care across the United States. Conducted factual research, drafted memoranda, participated in stakeholder outreach, and managed discovery files.

CASA of The Southern Tier, Painted Post, NY 2013 – 2018
Court Appointed Special Advocate Volunteer. Appointed by a family court judge to represent the best interest of abused and neglected children in dependency proceedings. Maintained regular contact with client children and professionals. Submitted periodic reports to the court. Awarded 2018 Volunteer of the Year.

BAR ADMISSIONS

State of Connecticut
District of Connecticut
Middle District of North Carolina, *pro hac vice*

PROFESSIONAL ACTIVITIES

Federal Courts Committee Member, New York City Bar Association
Children and the Law Committee Member, New York City Bar Association

SKILLS AND INTERESTS: Animal Rights, CrossFit, Conversational German, Country Music, Ethics.

Bianca Herlitz-Ferguson
List of References

Academic References:

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Clinical Lecturer for Advanced Appellate Litigation Project

Joette Katz
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Clinical Lecturer for Children and the Law

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Deputy Defender General
Chief Juvenile Defender
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Deputy Director
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Supervising attorney during legal fellowship

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TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 11-NOV-2021

Record of: Bianca Monet Herlitz-Ferguson Page: 1
Issued To: Bianca Herlitz-Ferguson
Parchment DocumentID: 36771634

Date Entered: Fall 2018

Degree Awarded : Juris Doctor 04-JUN-2021

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2018					
LAW	10001	Constitutional Law I:SectionA	4.00	CR	R. Post
LAW	11001	Contracts I: Group 1	4.00	CR	L. Brilmayer
LAW	12001	Procedure I: Section B	4.00	CR	H. Koh
LAW	13001	Torts I: Section A	4.00	CR	G. Calabresi
		Term Units 16.00	Cum Units 16.00		
Spring 2019					
LAW	21027	Advanced Legal Research	2.00	H	S. Stein
LAW	21050	Federal Income Taxation I	4.00	P	A. Alstott
LAW	21051	FedIncTax:BusFinanceBasics	1.00	CR	A. Alstott
LAW	21601	Administrative Law	4.00	P	N. Parrillo
LAW	21739	Federal Indian Law	3.00	H	G. Torres
		Term Units 14.00	Cum Units 30.00		
Fall 2019					
LAW	20061	Criminal Law andAdministration	4.00	P	J. Whitman
LAW	20097	Medical Legal Partnerships	3.00	H	A. Gluck, R. Iannantuoni, K. Kraschel
LAW	20104	Social Justice	4.00	H	B. Ackerman
LAW	20407	ChildDevelopmentLawPolicyLab	2.00	H	A. Alstott
LAW	40002	Supervised Research	2.00	CR	N. Parrillo
LAW	50100	RdgGrp:LegalScholarshipWorkshp	1.00	CR	J. Morley
		Term Units 16.00	Cum Units 46.00		
Sup. Research: Marshall-Brennan Constitutional Literacy Project.					
Spring 2020					
LAW	21097	Medical Legal Partnerships	3.00	CR	K. Kraschel, R. Iannantuoni
LAW	21407	ChildDevelopmentLawPolicyLab	1.00	H	A. Alstott
LAW	21482	Family Law	3.00	CR	D. NeJaime
LAW	21710	Introduction to Legal Writing	2.00	CR	N. Messing
LAW	30109	EducOpportunityJuvJusticeClin	1.00	CR	J. Forman, E. Shaffer, M. Gohara
LAW	30198	Complex Civil Litigation	2.00	CR	S. Underhill
		Substantial Paper			
LAW	40002	Supervised Research	2.00	CR	J. Driver
		Term Units 14.00	Cum Units 60.00		
Sup. Research: Marshall Brennan Project. Spr2020 YLS classes completed after 3/6/20 graded only on a CR/F basis due to COVID-19.					
Fall 2020					
LAW	20066	Legislation	3.00	P	A. Gluck
LAW	20248	InterveneCriminalYouthQueerTra	2.00	H	M. Bell, S. Violante-Cote, C. Desir
LAW	20300	Professional Responsibility	3.00	P	D. NeJaime
LAW	20546	Constl&CivRtsImpactLitigation	2.00	H	L. Guttentag
LAW	30111	Advanced EOJJ Clinic	1.00	H	J. Forman, E. Shaffer, M. Gohara

********** CONTINUED ON PAGE 2 **********

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TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 11-NOV-2021

Record of: Bianca Monet Herlitz-Ferguson
Level: Professional: Law (JD)

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Institution Information continued:					
LAW	30200	AdvAppellateLitigation Project	3.00	H	T. Dooley, D. Roth
		Term Units 14.00	Cum Units	74.00	
Spring 2021					
LAW	21249	InterveneCriminalYouthQueerTra	2.00	H	M. Bell, S. Violante-Cote, C. Desir, E. Bildner
LAW	21461	Children and the Law	3.00	H	J. Katz
LAW	30111	Advanced EOJJ Clinic	2.00	H	J. Forman, E. Shaffer, M. Gohara
LAW	30200	AdvAppellateLitigation Project	3.00	H	T. Dooley, D. Roth
LAW	40001	Supervised Research	3.00	H	A. Alstott
		Supervised Analytic Writing			
		Term Units 13.00	Cum Units	87.00	

********** END OF TRANSCRIPT **********

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YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

June 15, 2023

The Honorable Tanya Chutkan
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 2528
Washington, DC 20001

Dear Judge Chutkan:

I write to recommend Bianca Herlitz-Ferguson to serve as a law clerk in your chambers. As a former clerk to both district and circuit judges, I have some understanding of what makes a good law clerk; as an attorney in private practice, I have some understanding of what makes a good lawyer; and, as a lowly "Visiting Clinical Lecturer" at the most elite law school in the world, I have some understanding of what allows a person to maintain an even keel amidst a sea of "Masters of the Universe." Bianca possesses all these qualities, which is why I believe she will be a welcome addition to your chambers.

I came to know Bianca in my capacity as co-director of the Yale Law School Advanced Appellate Litigation Project, which is a clinic offering students the opportunity to represent otherwise pro se appellants in the federal courts of appeals--primarily the Second and Third Circuits. The clinic has become an extremely popular offering over the last several years, largely because we require our students to really take on ownership of our matters and because--while our clients tend to come from marginalized backgrounds--we are not regarded as an "issue oriented" clinic. I provide this background merely by way of emphasizing that we get a lot of applicants, and we take very seriously the task of selecting students whose applications demonstrate not only high academic achievement but also the qualities of being a good team player and a good person, besides. By definition, all of our applicants are Yale Law Students, the cream of the crop. But we look for something more, and we've been quite successful in filling our rosters with uniformly impressive students. All that said, Bianca is one of my favorites.

Bianca was a key member, and ultimately the leader, of a team of students working on a habeas appeal involving a claim of ineffective assistance of counsel in plea bargaining. Habeas appeals tend to be among the most interesting, but by far the most difficult, of the matters our clinic handles. The records are almost by definition extremely long and complex and the students must master all of the facts and nuances contained therein, while keeping straight the shifting legal standards that have accompanied a case through a state direct appeal, a state collateral proceeding and appeal, and a federal collateral proceeding before it has even reached us. Bianca impressively marshaled all of the facts necessary to pursue relief and played a key role in crafting what I felt to be a very compelling set of briefs in a longshot appeal. Perhaps more impressive, she then committed all of this to memory and calmly and assuredly presented oral argument before a very active panel of Third Circuit judges. While we did not ultimately prevail (we're used to losing, I'm afraid), I was extremely impressed with Bianca's skills as a lawyer and her compassion for our client.

In addition to being extraordinarily reliable and competent, Bianca is a pleasure to work with. She has no ego, no sense of entitlement; she just wants to do her part to advance a shared goal. And, when I got to know her a bit in the course of traveling for argument, I found her to be incredibly mature, with a very full and interesting life outside the law.

In short, Bianca was one of my favorite students, and I feel confident that she will be an excellent addition to your chambers.

Please don't hesitate to reach out to me if you have any questions regarding her application.

Tadhg Dooley - tdooley@wiggin.com - 203 498 4549